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Eng. V.
20
Nº 70.





NOTES OF CASES

IN THE

ECCLESIASTICAL & MARITIME COURTS.

VOLUME I.



EASTER TERM 1841 TO TRINITY TERM 1842.

31

LONDON:

THOMAS BLENKARN (LATE CROFTS & BLENKARN),
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PREFACE.

THIS work owes its existence to a suggestion from several members of the Profession at Doctors Commons, not with a view of interfering with the authorized and received Reports, but to supply, in the interval between the decisions and the publication of such Reports, more full and accurate Notes of important cases, which are constantly occurring in the Courts (especially since the passing of the Will Act, 1 Vict. c. 26) than can be expected to be found in the daily vehicles of public information.

The Editor undertook the office of preparing these Notes with a distrust of his own competency to execute it satisfactorily; the favourable reception which they have experienced from every branch of the Profession, as well as in the Courts of Common Law, and even at the Privy Council, has, therefore, yielded him a very grateful reward for the labour bestowed upon them. Since the commencement of the work (which is published in monthly parts), in December, 1841, Dr. Curteis has brought down his able Reports to a date which includes some of the earlier cases in this volume, and the professional reader will not, upon comparison, discover that he has reposed a temporary confidence in this work which it does not deserve.

The Notes comprehend *all* cases, involving any point of importance, which have been determined, during the period they embrace, in the various Courts of Ecclesiastical and Maritime jurisdiction, including ruling decisions in the highest Court of Appeal, the Judicial Committee of the Privy Council. In compiling them, the Editor has endeavoured to adhere to the direction of Lord Bacon,* in stating the cases, and in reporting the opinions of the Judges; but he has presumed to depart from it in giving abridgments, sometimes copious, of the arguments of Counsel, which are often valuable compendia of learning and research, and therefore extremely useful to the Practitioner.

The Editor performs a pleasing duty in acknowledging, with gratitude, that, in every instance in which he has had occasion to seek information from any member of the Profession, it has been furnished in the most prompt, liberal, and courteous manner.

THOMAS THORNTON.

December 31st, 1842.

* "Casus præcisè, judicia ipsa exactè, perscribito; rationes judiciorum, quas adduxerint Judices, adjicito; de advocatorum perorationibus, sileto." *De Augm. Scient.*, l. viii. c. 3. Prefixed by Dr. Addams to his Reports.

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 Court of the Dean and Chapter of St. Paul's.
 Court of Surrogates of the Judicial Committee.

NOTES OF CASES.

EASTER TERM, 1841.

Prerogative Court of Canterbury.

APRIL 26.

IN THE GOODS OF JOHN FERGUSSON SMITH, DEC.— *Motion.*—The testator, formerly of Calcutta, in the East Indies, late of London, died 18th March last, having executed a will, in his own writing, dated 10th June, 1835, whereof he appointed J. H., W. F., and his widow (during her widowhood), executors. By this will, the whole annual interest of his property was bequeathed to his widow, for her sole use and benefit, and for the maintenance of their children; and after her death, the principal was settled upon the children, as by a deed of assignment which he had executed in 1833 in their behalf. In the event of all his children dying without issue, he bequeathed the principal of his property to any children his wife might have by any future marriage, and should she survive all her children, then she was at liberty to leave the whole property to whom she pleased, except a family mentioned therein. In May, 1838, the testator executed a codicil, also written by himself, on the first side of a sheet of foolscap paper, wherein he states it to be his desire, in the event of his dying before his son had completed his term of clerkship with a solicitor, that his wife should be allowed £60 annually for his maintenance till the term expired, in July, 1843. The deceased's name is signed at the foot of this codicil, but there are no

An unattested codicil, confirmed by a later codicil attested, pronounced for.

The will.

Codicil unattested.

- APRIL 26** subscribed witnesses thereto. In August, 1840, he made a further codicil, in his own writing, on the second side of the sheet of paper on which the first was written, and which
- Smith, dec.* Codicil attested he described at the head, "Second codicil to my last will and testament." By this paper he confirms what he had directed in the former codicil, written on the other side of the sheet, respecting the allowing £60 to his son till July, 1843, and further empowers his executors to pay such sums of money as might be requisite, after his son had completed his clerkship, to have him admitted as an attorney and a solicitor. This codicil was signed by the testator, and attested by two witnesses.
- Questions.** The questions were, whether the deed of assignment, being referred to in the will, should be considered part of it, and be proved therewith; and whether, under the Act, probate could be granted of the paper of May, 1838. The property was between £4,000 and £5,000.
- ARGUMENT.** *Haggard, D.*, moving for probate, submitted that the deed was not testamentary, being merely referred to in the will, and could be produced, if required, in a Court of Construction; and that the codicil of 1838, being confirmed by that of 1840, was republished thereby.
- JUDGMENT.** SIR HERBERT JENNER was of opinion that the deed should form part of the probate, and that the codicil of 1838, being confirmed and republished by the codicil on the other side of the paper, was entitled to probate therewith.

A solicitor *GODRICH v. JONES.*—*Motion.*—On this cause (a question as to the validity of the will of Mrs. Harriet Loyd) coming on for hearing, an objection was taken, on the part of the opposer of the will, to the non-production of certain documents, by the drawer of the will, Mr. Richard Kirkman Lane, a solicitor, whose testimony, when the cause was about to be heard on a former day,* had been objected to, on the ground of his interest in the event of the suit, and who (with permission of the Court) had been released and re-examined. In his first examination, he had stated that he had made entries in his books at the time, with reference to the validity of the will. In his second examination, he had stated that he had made entries in his books at the time, with reference to the validity of the will.

* See 9 *Monthly Law Mag.*, 213.

to the drawing of the will,* and he was required by interrogatory to produce to the Examiner, and let the Examiner copy into his deposition, the extracts; to leave fac-simile copies thereof, and to be asked if the copies were correct, and if the originals remained in the same state as when first written. This interrogatory had been answered, and the Examiner had collated the fac-simile copies with the originals. The Court was now moved to require the witness to produce the original books themselves.

APRIL 26.

Godrich v. Jones

Sir J. Dodson, Q. A., and Haggard, D., in support of ARGUMENT.

the application. Mr. Lane, who admits that he was called in by Mr. Godrich to draw a will for the deceased, with whom he had no previous acquaintance, states that he entered into his day-book, or bill-book, a very minute account of certain interviews he had with Mr. Godrich and the deceased, with reference to this transaction, *recenti facto*. In his evidence he speaks not only from recollection, but from what he put in writing at the time. The witness being produced by his own client, all privilege is at an end, and considering the circumstances under which he has been re-examined—after having seen the other evidence—it is necessary for the ends of justice that we should have the fullest means of testing his accuracy, by observing what he committed to writing contemporaneously with the transaction. The original entries in the day-book may be considered as instructions for the will, there being no other instructions.

No privilege.

The entries
quasi instructions.

Addams, D., contra. The witness is not bound to produce his books, except those parts immediately connected with the making of the will, which he has done.

* These entries, which were made in his bill-book, were of the following character: "February 7th, 1836, attending Mr. Godrich, who had informed me of your being resident with him, and when that took place, and of your intention to benefit him further by your will; and the case being peculiar, and being liable to be open to future contest, after much consideration and inquiry, I saw no reason why Mr. Godrich should not take the larger benefit you intend."—"February 13th. Mr. Godrich sent for me, and on being introduced, you rose to receive me, which, considering your advanced age, much surprised me." The conversations with the deceased are, in like manner, particularly detailed; these entries being in the form of charges to the deceased.

APRIL 28.

Godrich v. Jones

JUDGMENT.

No precedent
for the applica-
tion.

If the ex-
tracts had been
pleaded.

Are all wit-
nesses to be so
required?

The interro-
gatory has been
answered.

SIR H. JENNER.—This is a novel application ; at least, I never recollect an application being made, in which it was contended, that because a witness examined on a *condidit* referred to certain entries in his books, in relation to the transaction of which he speaks, and to which entries he may refer to refresh his memory, he is bound to produce the books themselves. I know of no authority under which a solicitor, in such circumstances, is required to produce his books, that an adverse party may see what they contain, in reference to other matters as well as to the transaction in question. If the extracts had been pleaded by the party propounding the will, the case would be different ; but I cannot compel Mr. Lane to produce his books that they may be examined in order to see whether the extracts are true extracts, and whether there are any other entries relating to this transaction. I have no precedent, nor principle, nor any thing of the nature of authority, for complying with this application. Is a witness in every case, solicitor or not, where a party suggests fraud, to be compelled to produce all his books for the inspection of that party ? I am of opinion, that I am not at liberty to call upon Mr. Lane to produce his books, or any further extracts from them, not connected with the transaction, than he has produced in reply to the interrogatory, which I think he has answered fairly and properly. He has declined to answer some questions, to which he is entitled to demur. If the other party allege that he has not sufficiently answered, that is a different question ; but I am of opinion that he has complied with the direction of the interrogatory.

Arches Court of Canterbury.

APRIL 30.

Church-rate.

—A retrospec-
tive rate, raised
to cover ex-
penses incurred
through the re-
fusal of the ma-
jority of the
vestry to make
a rate, pro-
nounced
against.

ELLIS AND GOUGH v. GRIFFIN. —*Cause.*—This was a suit of Subtraction of Church-rate, by the churchwardens of Portsea, against Mr. William Griffin, a parishioner, for non-payment of 7s. 6d. The suit commenced in July, 1835, and was brought in this Court by Letters of Request

from the Court of Winchester. The Libel, which was admitted without opposition, pleaded the making of the rate on the 29th October, 1834; that the party sued had been summoned before the magistrates, when he had objected to the validity of the rate. A defensive Allegation was admitted, also without opposition, which set up various grounds of opposition to the rate; in particular, that it was retrospective, the amount raised being £400, of which £252 was to defray debts incurred in a previous year. A responsive Allegation, offered on behalf of the churchwardens, which was opposed, but admitted by the Court, pleaded that they entered upon their office in April, 1833, and that, on the 17th October in that year, they summoned a vestry, at which a rate was proposed, whereupon an amendment was moved and carried to the effect, "That it is the opinion of this vestry, that the church-rate now proposed to be made is unjust and oppressive on the inhabitants and parish at large, and therefore that this meeting do adjourn, and take the subject into its consideration on the first Wednesday in October, 1834;" that on the 29th October, 1834, the same churchwardens, who were re-elected for another year, called another vestry, when they stated that they had been obliged to incur debts and liabilities, owing to the refusal of a rate in 1833, which they proposed to pay out of the rate, and, although an amendment was moved to adjourn the consideration of a rate for another twelvemonth, a rate of 3*d.* in the pound was carried by poll.

APRIL 30.

Ellis v. Griffin.

Libel.

Defensive Allegation.

Responsive Allegation.

The COURT (Sir H. Jenner), in admitting this Allegation, was of opinion that there was not such a statement of admitted facts in the respective pleas as would enable the Court to decide a question of such importance. "The Allegation of the churchwardens," the Court observed, "does not admit the facts pleaded by the other party, but it does admit, to a certain degree, one fact which, it is contended on the other side, is sufficient to determine the question of law, namely, as to the retrospective nature of the rate. It is contended, and cases* have been cited to shew, that a

29 April, 1836.
JUDGMENT.

* The case of *Farlar v. Chesterton* had not then been decided by the Judicial Committee.

APRIL 30. rate clearly retrospective cannot be recovered in these courts ; on the other hand, it is said that this case is materially distinguished from those cases, and it is an important question whether there is not a material distinction, where the inhabitants refuse a rate and adjourn the consideration of it to another vestry. Assuming the rate made in 1834 to be in other respects a legal rate, a question might be raised, which would be open to a good deal of argument, whether, the question being adjourned till 1834, and then agreed to, the churchwardens might or might not contract expenses in 1833, after the rate was refused in the first instance. But the question is now, whether the Court is at present in a condition to decide this and other important points, without a *constat* of facts. It is admitted that, *primâ facie*, a rate to reimburse churchwardens on the face of it is illegal, and cannot be enforced ; the Court, however, is not called upon to decide that abstract question, but whether the circumstances connected with this case do or do not place it in a peculiar point of view. I am unwilling to put the parties to expense, but the Allegations must go to proof : the question is not in such a state as to enable the Court to determine the validity or invalidity of the rate till the facts are proved."

Rule nisi for prohibition.

Demurrer to declaration in prohibition sustained.

Hearing of the cause.

April 30. ARGUMENT.

Upon this decision, the party sued applied to the Court of Queen's Bench for a prohibition, and obtaining a rule nisi, was directed to declare in prohibition, which declaration being demurred to, the case was argued at the sittings in banc after Trinity Term 1839, when the Court held that the demurrer must prevail, on the ground that an erroneous judgment, in a matter within its cognizance, did not entitle a party to prohibition to the Ecclesiastical Court, his remedy in such a case being by appeal.*

The case now came on for hearing upon the depositions of the witnesses in support of the Libel, and the personal answers of the parties.

Addams, D., for the churchwardens. The *factum* of the rate is not denied, and there is now no question as to the

* A report of the decision is given in Rogers' *Practical Arrangement of Ecclesiastical Law*, App. p. 1009*, headed " Retrospective Church-rate."

mode in which the poll was taken; the only objection is, that the rate is retrospective. The amendment carried in 1833 was tantamount to a refusal of the rate, and having no funds in hand, the churchwardens at first intended to have made a rate in vestry with the consent of the minority, which, according to the present doctrine,* would have been legal; but they were advised not to do so, and the parishioners who had proposed and carried the amendment, knew that the churchwardens had no funds, and that the church could not be kept open without expense; but so it remained till October, 1834, when the churchwardens laid before the vestry a statement of the debts and responsibilities they had incurred in consequence of the refusal of the rate in 1833, and calculating that £150 would be necessary to carry them through that, their second year of office, amounting together to £400, obtained a rate of 3d. in the pound by a majority, on a poll of the parishioners. I contend that this is not, under the circumstances, a retrospective rate, in the sense which renders it incumbent upon this Court to refuse to enforce it. The doctrine as to retrospective rates has been much misunderstood, and was never intended to be pressed to the extent which is now attempted. The case of *Lanchester v. Thompson*,† and the other cases, have no application to such a case as this. In *Farlar v. Chester-ton*, decided on appeal before the Judicial Committee, Mr. Justice Erskine, in delivering the judgment of the Court, grounded the illegality of the rate upon its having been made for the liquidation of large outstanding demands incurred in several previous years, “the facts pleaded affording no excuse.”‡ In the present case, the rate was not made to pay

APRIL 30.

Ellis v. Griffin.

A rate by minority mediated.

Not a retrospective rate in legal effect.

* Judgment in the Court of Exchequer Chamber, February 8th, 1841, on a writ of error from the Court of Queen's Bench, in the case of *Burder v. Velej and Joslin*.

† 5 Madd. 4.

‡ 2 *Monthly Law Mag.*, 440. The case is reported in 1 Curteis, 371; but, as the judgments of the Judicial Committee are not given by that learned reporter, and there being no other published report of their lordships' judgment in this case than is to be found in the magazine, Dr. Addams cited it therefrom, bearing testimony (he having been present at its delivery, as counsel in the cause) to its accuracy.

APRIL 30. off debts incurred in former years, and the facts pleaded
Ellis v. Griffin. offer a sufficient excuse, the same identical churchwardens
 having, in the previous year only, nobly expended money
 out of their own pocket rather than shut up the church. If
 the parish had refused the rate in 1834, the churchwardens
 would have been without remedy; but since the parishion-
 ers granted a rate, with their eyes open, it is too late now to
 resist its enforcement. From the judgment in this case in
 the Court of Queen's Bench, which allowed the demurrer to
 the declaration in prohibition, it is clear that the Court did
 not consider the rate bad on the ground of its being retro-
 spective, or it would have granted a prohibition; the infe-
 rence is, that the Court considered that peculiar circum-
 stances might explain and justify its retrospectiveness.
 Parishioners assemble in vestry to do what is obligatory
 upon the parish by the common law, not to shift off obliga-
 tions. In former times, a court of equity would have com-
 pelled a rate to reimburse churchwardens. There is nothing
 in the case of *Farlar v. Chesterton*, or any other of the
 cases, to prevent this Court from entering into a considera-
 tion, whether the retrospectiveness be not justifiable under
 the circumstances. The parishioners are not to take ad-
 vantage of their own wrong act.

Court may
 consider if the
 retrospective-
 ness be justifi-
 able.

Nicholl, D., for the party sued. It is admitted that, al-
 though the churchwardens went into office in April, 1833,
 the vestry which refused the rate was not held till October;
 consequently, there was a certain degree of *laches* on their
 part. The vestry adjourned the question till the first Wed-
 nesday in October, 1834; but the churchwardens chose to
 let that time pass by, and to summon a vestry on another
 day; therefore, the second vestry was not a meeting held by
 adjournment. The churchwardens should have summoned
 a vestry immediately after being sworn into office, and
 if it refused a rate, they ought to have applied to this Court
 for a monition to compel the parishioners to meet to make a
 rate, on pain of punishment, or to have moved the Court
 of Queen's Bench for a *mandamus*; but they did neither. It
 is clear from the whole current of authorities, that a rate
 retrospective, not only for past years, but for a past single

Churchwar-
 dens in *laches*.

Nothing can
 justify retro-
 spectiveness.

year,* is not recoverable. In *Chesterton v. Farlar*, the judge of the Consistory Court held that no facts could justify a retrospective rate, and the Judicial Committee took the same view of the law. The effect of the decision in the Court of Queen's Bench in the present case, on the declaration in prohibition, was merely that, church-rate being matter of ecclesiastical jurisdiction, and it was not to be assumed that this Court would do wrong, the Court would not interfere in such a mode in that stage of the case. In *Farlar v. Chesterton*, the rate was retrospective to the extent of only one-third; here it is three-fifths of the whole sum raised. The churchwardens (and it makes no difference whether they were the same or other persons), having considered the adjournment of the question in 1893 as a nullity, and as a peremptory refusal of the rate (which they were justified by law in doing), and not having called a vestry on the first Wednesday in October, 1894 (whatever might be the effect of such a proceeding), and taking no steps in the interval to compel a rate, incurred debts and liabilities on their own personal responsibility, and a rate to re-imburse them is illegal and void. The party must, therefore, be dismissed with costs.

APRIL 30.

Ellis v. Griffin.

Effect of the decision in Q.B.

Harding, D., on the same side.

Addams, D., in reply. All that was determined by the Judicial Committee in *Farlar v. Chesterton* was, that the facts were not sufficient to justify a retrospective rate. If the rate is bad in this case, why did not the Court of Queen's Bench so decide, when a prohibition was moved for, as in the Braintree case? [PER CURIAM.—In the Braintree case, the judges held that, in point of fact, it was no church-rate at all, and therefore that it was an excess of jurisdiction in these courts to entertain the suit.] If the law says that no retrospective rate whatever could be a good and valid rate, the Court of Queen's Bench ought in this case, for the same reason, to have interfered by prohibition.

REPLY.

PER CURIAM.

SIR H. JENNER.—In this case, the question seems to be confined to this point: whether the circumstances are such as to distinguish it from that of *Farlar v. Chesterton*; for if

JUDGMENT.

* *Rex v. Churchwardens of Dursley*, 5 Ad. and Ellis, 10.

APRIL 30. the circumstances of the two cases are identical, or so nearly
Ellis v. Griffin. as not to be distinguished, I apprehend that this Court is
 bound by the decision in that case to pronounce against the
 validity of the rate.

In the case of *Chesterton v. Farlar*, the vestry of the parish
 of Kensington, with a full knowledge of the facts, granted a
 church-rate to liquidate debts incurred in former years. In
 this case, a vestry was called in the parish of Portsea, in Oc-
 tober, 1833, to make a rate for the repairs of the church and
 expenses incidental to the office of churchwarden, when an
 amendment was moved and carried, that the question be ad-
 journed till the first Wednesday in October, 1834. The
 churchwardens, on this refusal (for in law it was a refusal),
 proceeded by their own authority, and that of the minority
 in the vestry, to make a rate, but were advised that they
 could not sue for it, and it was consequently abandoned.
 Whether this advice was given with a due consideration of
 all the circumstances of the case, I have no information; I
 have only the fact that it was abandoned, and that there were
 no proceedings to call another vestry till the 29th October,
 1834, when the same persons were in office as churchwar-
 dens. I can see no distinction between cases where the same
 individuals are in office a second year, and where they are
 different individuals, because it is as churchwardens that
 they sue, and as churchwardens their year of office expired
 in Easter week: it seems in this case the election took place
 on the 9th April. In point of fact, these gentlemen were re-
 elected and re-sworn into the office. Now, although no
 vestry was called to make a rate till October, I cannot as-
 sume that there was any degree of *laches* on the part of the
 churchwardens in the execution of their duty; for it is
 impossible to say that they must not have time to look about
 them, to consider what repairs or expenses are necessary,
 and to be prepared with estimates to lay before the vestry.
 It appears that, in the year 1833, up to the termination of
 the ecclesiastical year (if I may so call it) in 1834, they had
 incurred debts, and at the vestry held on the 29th October,
 1834, a rate was made for £400, including £250 for ex-
 penses incurred in the former year (of which a statement

On refusal, a
 rate made by
 minority;

but abandoned.

Church-war-
 dens not in any
 laches.

was laid before the vestry), in consequence of the refusal of the parish to make a rate. Now I cannot say that there is such a strong distinction between this case and that of *Chesterton v. Farlar*, as to authorize me to hold this to be a rate which I can support, without a well-grounded apprehension that, if I were to pronounce in favour of its validity, my judgment would be reversed by the superior court. I have every disposition to give proper support to the churchwardens, who were placed in a situation of great hardship and difficulty by the refusal of the rate in 1833; but, unfortunately, the rate being refused, and no rate being made by the minority of the vestry, and the meeting not being held pursuant to adjournment on the first Wednesday in October, 1834, and not till the 29th of that month,—I say, with every desire to give proper support to the churchwardens, I feel that the case of *Farlar v. Chesterton* is a decision which must govern this Court in future cases, unless there are circumstances of distinction, and I do not think that there are circumstances in this case to distinguish it from *Farlar v. Chesterton*. I must, therefore, pronounce against the rate, and dismiss the party.

APRIL 30.
Ellis v. Griffiths.

Case governed by *Chesterton v. Farlar*.

Rate pronounced against.

With regard to costs, it is usual, where churchwardens sue on a valid rate, to consider them entitled to their costs, and I am afraid—though I cannot but feel the hardship of it—that I should not act fairly without condemning these churchwardens in the costs. I am sorry for it; it is a case of extreme hardship on the churchwardens; but I am afraid I cannot, according to the rules of these Courts, refuse to condemn them in the costs.

Churchwardens condemned in costs.

High Court of Admiralty.

MAY 4.

THE “WESTMORELAND.”—*Cause*.—This was a suit by three mariners, to recover their wages, which were withheld by the owners on the ground that they had been forfeited by desertion. The principal facts, upon which the parties were agreed, were as follows:—The vessel left England in August, 1839, bound on a voyage thus described in the articles:—

Wages. —
 What is the law of desertion, since the stat. 5 & 6 Will. 4, c. 19. —
 Wages, withheld after the

MAY 4. "From the port of London to Swan River, Western Australia; from thence to any port or place in the Indian or China seas; and during her stay and trade there, until her return to a port of discharge in Great Britain or the Continent of Europe; in either case, the voyage to end in Great Britain, and the cargo delivered, if required: the voyage not to exceed three years." She arrived at Swan River in January, 1840, there discharged her cargo, and there the mariners now suing were hired, signing the original ship's articles. The vessel left Swan River 30th April, and after visiting Batavia, the vessel went to the island of Lombok, and in June, 1840, sailed thence with a cargo homeward-bound, and reached Cowes on the 28th October, and on the 30th, the master, after communicating with the owners, brought a North Sea pilot on board, for the purpose of conducting the ship to Holland, and there unloading the cargo. It was his intention then to return with the vessel to a port of Great Britain. The mariners, apprehending that, by the terms of the articles, they were not bound to proceed to Holland, required the master to give them their discharge, which he refused. Thereupon, they went on shore early the next morning, to seek advice, and whilst so occupied, were taken up, carried before the magistrates sitting at Newport, and, refusing to return on board the ship and do their duty, they were, by the authority of the magistrates, committed to the House of Correction, there to be kept to hard labour for thirty days, under the 6th sec. of 5 and 6 Will. 4, c. 19. Before the thirty days had expired, the vessel left Cowes for Rotterdam. The wages sued for were from the 2nd January to the 30th October, 1840.

Dec. 30. The admission of the Summary Petition of the mariners was opposed, on the ground that the facts pleaded shewed that there had been an absolute desertion, which, under the statute, as well as under the general maritime law, inured to a total forfeiture of the wages.

JUDGMENT. **DR. LUSHINGTON.**—There is not enough, on the face of the facts, to authorize me to hold that there has been an absolute desertion; and before I could come to a decision that would work a total forfeiture of the wages of the ma-

mariners had been committed to prison under statute, pronounced for. —Penalties of Statute.

Westmoreland.

riners, I must have proof of all the facts on which the desertion is grounded. I do not hesitate to say that, if the men went on shore merely to take advice, *bonâ fide*, as to the construction of the articles, and were taken up, and by the magistrates, without being allowed time for consideration, committed to prison, it would not amount to a forfeiture of wages.

MAY 4.

Westmoreland.

The going on shore *bonâ fide* to take advice, no desertion.

An Allegation, on the part of the owners, responsive to the Summary Petition of the mariners, was opposed. It contradicted some statements in the Petition, and pleaded that the master went to Cowes merely to receive orders from his owners; that the seamen knew that Cowes was not a port of discharge for the goods of which the cargo consisted; that when the crew were dissatisfied at the prospect of going to Rotterdam, the master produced and read the articles, when some of the men declared that the words "or Continent of Europe" were not in the original articles; that the orders of the master to weigh anchor were disobeyed; that the mariners, after going on shore, remained for three or four hours loitering about Cowes; that when brought before a full bench of magistrates, they alleged that the words "or Continent of Europe" were not in the original articles; that the magistrates advised the men to return on board, or they would subject themselves to imprisonment and loss of wages; that they nevertheless refused, and were accordingly committed to prison; that the master was obliged to hire other men, and was detained at Cowes till the 5th November; that the vessel proceeded to Rotterdam, and arrived in London on the 12th December, and that the owners had incurred an additional charge of £35 for wages by the conduct of the mariners.

January 21.
Responsive Allegation.

It was contended that this Allegation was no answer to ARGUMENT. the Petition, and that the case of the "*George Home*"* was decisive as to the invalidity of the articles. In that case, Articles invalid. which was on an agreement to go "from London to Batavia, to any ports and places in the East-India seas or elsewhere, and until her final arrival at any port or ports in

* 1 Hagg. A.R. 370.

MAY 4.
—
Westmoreland.

Europe," Lord Stowell held that, on the arrival of the ship at Cowes, for orders (as previously agreed on between the owners and master), the seamen were not bound to proceed on a further voyage to Rotterdam; the description in the mariners' contract not satisfying the statute (2 Geo. 2. c. 36).

JUDGMENT.

DR. LUSHINGTON.—There are several questions in this case of very considerable doubt and difficulty, and of the greatest importance. I am for the first time to put a construction upon the 5 and 6 Will. 4, c. 19; to distinguish between the present case and that of the "*George Home*," as far as regards the wording of the articles, with reference to the different terms of the statute 2 Geo. 2, and the present statute. And this is not all; in looking to this statute, I am to consider whether the case comes within the 6th section, and whether the parties were properly committed by the magistrates to gaol. It is said that, if they were not properly committed, still there has been a forfeiture of wages; but I am of opinion, that the 6th section and the 9th section cannot both apply to the case, and legally that there cannot be imprisonment and forfeiture of wages too. It is said, the mariners have their remedy by an action at law; but I must recollect who the parties are, and that the proceedings were at the instance of the master, who was the agent of the owners, and I am by no means prepared to say, that the owners are not to be responsible for his acts, or that this Court, exercising an equitable jurisdiction regarding wages, is at liberty to leave that circumstance out of its consideration. The course I shall pursue is this: to take till next court day to consider whether, with justice to all the parties, I can dispose of the case on the admission of this Allegation; if not, I shall be under the necessity of admitting the Allegation, reserving my decision until all the facts are in proof before me.

Construction
of § 6 & § 9 of
the stat.

Cur. adv. vult.

Allegation
admitted.

March 24.
ARGUMENT.

Ultimately, the Court admitted the Allegation to proof, and the case came on for argument.

Addams, D., for the mariners. The interpretation which the mariners would put upon the articles in this case, and the fair interpretation, is, that when the vessel arrived at a

port in this country, they were entitled to their discharge. It was never explained to the men that the vessel was to call in the Channel for orders, and then to go to the Continent. According to the steward (the master being on shore), when the men, hearing that the vessel was to proceed to the North Sea, were preparing to go ashore, he told them if they did so, it would be an act of desertion. The master states that he obtained a warrant and apprehended the men. This was an illegal act. He should have gone to Mr. Day's office, where they were, and have explained the matter. The magistrates, in committing these men, did an illegal act, under a misapprehension of the statute, and the master is liable to an action for false imprisonment. The 6th section of the Act gave the magistrates no jurisdiction in this case, for it relates to desertion before the commencement of the voyage. The other cases of desertion are provided for by other sections, and the Act defines what desertion is, and requires certain formalities. But there cannot be two penalties—imprisonment with hard labour, and forfeiture of wages too. When the common law and the statute law differ, the common law gives place to the statute.

Robinson, D., on the same side. The articles must be construed according to the statute, which purports to do away with the uncertainties of the former law. Cited the "*George Home*."

Haggard, D., for the owners. The question is, whether the imprisonment awarded by the magistrates deprives the owners of the pecuniary forfeiture. The articles have been properly framed under the Act. The case of the "*George Home*" is not applicable; articles were then drawn up at the discretion of parties, in no prescribed form. Cowes is known to be no port of discharge, but a place of call for orders. The magistrates entered fully into the case, and the clerk states that the articles were explained to the men, as well as the consequences of disobedience; but all in vain. There has been on the part of the men a very gross breach of their contract, and the question is, whether they have not thereby forfeited their wages under the general maritime law. The statute does not deprive the Court of the jurisdic-

MAY 4.

Westmoreland.

Articles not explained to the mariners.

Their apprehension illegal.

Magistrates no jurisdiction under §6.

The articles must be construed according to the statute.

The "*George Home*" inapplicable.

Articles explained to the men.

Statute does

MAY 4.

Westmoreland.

not take away
Court's original
jurisdiction.

Owners en-
titled to a civil
remedy.

tion it possessed, and still possesses, independent of the statute law. *Abbott On Shipping* (Shea's Ed.) The "*Baltic Merchant*."* The men are punishable under the statute, and the question is, whether the owners have not a remedy of a civil kind for the inconvenience and expense they have suffered through the violation of the contract. The statute has undergone a construction in the Court of Exchequer, in *McDonald v. Jopling*,† where it was held that a seaman, quitting the vessel at her port of delivery, incurs a partial forfeiture of wages under sec. 7. Here the port was not that of delivery.

Nicholl, D., on the same side. I cannot understand how the mariners can prosecute their claim under an agreement which they say is not binding upon them. If they set it up as the foundation of their suit, it must be binding. An abandonment of the vessel before the cargo is discharged is a desertion, and inured to a forfeiture of wages under the old law. The conduct of the men was an abandonment, and their wages are forfeited.

Abandonment
before the dis-
charge of car-
go, a desertion.

May 4.
JUDGMENT.

DR. LUSHINGTON.—The first question is, whether the mariners were bound by the articles to proceed from Cowes to Holland? If they were not bound, then, of course, there could have been no forfeiture of wages. But, assuming that the owners are right in their construction of the articles, and the mariners were thereby bound to proceed with the vessel to the Continent, the Court will then have to determine whether all the facts amount to a desertion. I think it expedient to consider the latter question first; but it is not my intention to avoid giving an opinion on either of the great points raised in this case, because I think it will be material to the interests of all who shall be concerned on similar occasions, to know what the opinions of the Court are.

On the part of the owners, it is said that the facts constitute a desertion by the ordinary maritime law, which law is not, as it is argued on behalf of the owners, altered or repealed by the statute of the 5th and 6th Will. 4, c. 19. I do not find it averred that there has been a desertion under the statute; indeed, in the course of the argument, it was

No desertion
under stat.

* Edw. Rep. 86.

† 4 Mees. and Wels. 293.

expressly disclaimed by the Counsel for the owners that they sought to establish a desertion according to the terms and exigency of the statute ; and had it been attempted, the proposition could not have been contended for with any effect. I incline, however, to the argument of the Counsel for the owners, that this statute does not exclude the ancient maritime law, and that it is my duty to examine the facts, with a view to ascertain whether they amount to a desertion, according to the ancient principles which constituted the law of this Court, before that or any other statute was enacted.

MAY 4.
Westmoreland.

Stat. does not
exclude ancient
law.

I do not find from any of the books I have consulted, that there has been any common law definition of what desertion is, and, perhaps, it would be exceedingly difficult to state with precision any definition of that offence, which would comprise all the various circumstances under which it might have been committed. The statute does attempt a definition, so far as relates to that offence committed under it, for it states that "absence from the ship, for the space of twenty-four hours immediately preceding the sailing of the ship, without permission from the master, or for any period, however short, under circumstances plainly shewing an intention not to return, shall be deemed an absolute desertion." In the course of the argument, the Counsel for the mariners urged upon the Court, that these words of necessity negatived any other species of desertion ; that, in fact, they comprised all the desertion which the law intended to contemplate, and necessarily excluded from my consideration any circumstances, constituting a desertion, other than those stated in the 9th section. Although I am ready to admit that this argument is not without its weight, yet, upon the best view I can take of the question, I am of opinion that the statute, in order to work that effect, must have gone farther, and excluded the operation of those principles, and of that law, which formerly governed these cases. The circumstances I have recited as constituting desertion, under the statute, in the latter part of the 9th clause, would seem to include almost every possible case : "an absence for any period, however short, under circumstances plainly shewing an intention not to return." But I do not think it requisite

No definition
of "desertion."

MAY 4. to enter into a nice disquisition whether or not other and different circumstances might not be supposed capable of taking place in the various and extraordinary contingencies necessarily occurring in the performance of the duty of mariners in distant places. I shall not, therefore, attempt any definition of desertion generally, or of what was intended to be excluded by the statute ; but content myself with saying, that to constitute desertion, in such a case, there must be a complete abandonment of duty without justification, and such abandonment must be by quitting the ship. I must now proceed, step by step, in order to see whether there has been in this case any such complete abandonment of duty without justification.

Westmoreland.

It must include a complete abandonment, without justification.

Distinction between insubordination and desertion.

Going on shore without leave, to advise, no desertion.

At the time when the crew were informed of the intention to take the ship to Holland, it is alleged that they declined to perform their duty, in pumping and in other matters requiring their exertion as sailors. Assuming the fact to be so, such conduct would be insubordination, but it could not be desertion ; and it is most desirable clearly to bear in mind the distinction between the two offences. The utmost which could be said of it is this, that it may be a fact explanatory of the subsequent conduct of the mariners, and assuredly, whether they were right or wrong as to other matters, they were not obedient to their duty that night, and that was misconduct on their part. The next morning, the crew, having previously sent to consult Mr. Day, of Cowes, and having received a letter from him, went on shore, without leave, to advise with that gentleman as to the effect of the articles. I am of opinion that this step, so taken by the crew, cannot be deemed a desertion ; for whatever may be the legal effect of these articles, I entertain a most decided conviction that there is quite a sufficient degree of obscurity in them to justify the seamen in endeavouring to obtain information as to the extent of the obligation into which they had entered.

Releasing them, therefore, from all responsibility on account of this incipient step taken by them, the next thing is the arrest of the men at the instance of the master. The men went on shore between eight and nine in the morning ; the master applied for a warrant as soon as he heard of their

quitting the ship, and then they were arrested as soon as the constable could meet with them ; and most of them were either at the house of Mr. Day, or in the immediate vicinity (with the exception of one individual), and they were conveyed before the magistrates sitting in petty sessions at Newport. Now, up to this time, it is impossible to say that the men contemplated desertion. Time might have affixed that character to the conduct of the men ; but, according to the definition in the Act, there is not enough plainly to shew that it was not the intention of the sailors to return to the ship. Common justice requires that a reasonable time should elapse for the men to consider their situation under such circumstances, before the character of desertion could be fixed on them.

MAY 4.

*Westmoreland*No desertion
at time of ar-
rest.

The magistrates were of opinion that the articles bound the crew to proceed to Holland, and declared their judgment to that effect, telling them, also, that, by refusing to return, they rendered themselves liable to imprisonment and forfeiture of wages. The men persisted in following the advice they had received, which was of a contrary character, and the magistrates committed them to prison and hard labour for thirty days.

It has been said, that I cannot inquire into the legality of this order; or afford redress if it be illegal. It is quite true that this Court cannot give damages for false imprisonment; but so far as the imprisonment bears on the question of desertion, I think that I can and ought to inquire into it. I am of opinion that the magistrates, in proceeding under the 6th section of this statute, were in error, an error for which the obscurity of the statute, perhaps, may furnish some apology; but I must look at the result of that error: I say with confidence it is an error, not merely from the perusal of the 6th section, but for this reason; that even the Counsel for the owners did not venture to maintain that the magistrates had not miscarried in their judgment upon this point. Now, then, what was the result of this error? That the seamen were threatened with illegal punishment, were imprisoned when they ought to have been at large, and suffered a confinement which the law does not sanction.

Magistrates
in error in im-
prisoning under
§6.

MAY 4.
Westmoreland.

By illegal imprisonment, locus pœnitentiæ denied.

It appears to me, that the threat of illegal imprisonment, however innocently held out, even to enforce a lawful obligation, is not altogether an unimportant ingredient in this case; but the circumstance which weighs most deeply on my mind is this, that by the imprisonment, that which existed at the moment, principally, though not wholly, in declaration and determination, and which was not a consummated desertion, was by such imprisonment rendered absolute and complete; that the *locus pœnitentiæ* was taken away by the bodily arrest and illegal imprisonment. Had neither threats been used, nor imprisonment been inflicted, it is not impossible (and the seamen are entitled to the benefit of the supposition) that they might have returned to their duty on board the ship; and when I consider that this error, though an innocent one, was occasioned by the act of the master, or agent of the owners, I think the seamen are entitled to the benefit arising from it.

On the owners' construction of the articles, no desertion.

On the whole, I am of opinion, assuming the construction put by the owners on these articles to be correct, that there has not been a desertion, either under the statute, or by the ordinary maritime law, if such law is not affected by the statute.

The articles.

As I have proceeded hitherto on the assumption that the articles legally bound the seamen to proceed to Rotterdam, and have come to the conclusion that, even in that point of view, there has been no desertion, I might, perhaps, have been justified in abstaining from further observation; but I think I ought not to shrink from declaring my opinion as to the construction of these articles, though I feel the question is not wholly divested of difficulty.

First, let me consider whether there has been any authority cited in any degree applicable to the present case; then, how far the circumstances of any cases cited, and the present case, may correspond or differ; and also, whether the law, since the occurrence of any precedent, has been altered, so as to render any previous decision no safe guide in the present case.

Case of the 'George Home'

The case referred to is that of the "George Home," decided by Lord Stowell. It is not necessary to consider the

whole of the articles in that case. The decision went upon the description of the port of delivery, which was in these words: "Until her final arrival at any port or ports in Europe." The articles in the present case run thus, "Until her return to a port in Great Britain or the Continent of Europe." Now, if the law remained the same, and there was nothing else more definite or explanatory in the articles, I am at a loss to understand how any distinction could be taken between the cases. The whole reasoning of Lord Stowell applies with equal stringency to the one case as to the other. To use his own words: "The articles, with reference to the homeward voyage, would apply with equal truth to Corfu and to Archangel;" and most applicable is his observation, that "the contract ought to have stated that the ship was to call at Cowes for orders for the delivery of the cargo in England, Holland, or any other ports of the North Seas." I have stated, I believe, if not the precise words, yet the whole substance, of what fell from the learned judge upon that occasion; and I think it right to say, that I do most heartily concur both in the reasons assigned by him, and in the conclusion at which he arrives; and assuredly, unless I discover a clear distinction, arising from a difference of circumstances, I should not have the inclination, I might also say the presumption, to deviate from that high authority. There is no part of the judicial example set by that great judge to which I am more anxious to adhere, than that wise discretion wherewith he administered justice in equity in all cases where the claims of British mariners came under his cognizance.

MAY 4.
Westmoreland.

It has been suggested that, in the present case, the articles are essentially distinguished from those to which the seamen subscribed in the "*George Home*," and for this reason; that the voyage was limited to three years in the articles entered into in the "*Westmoreland*," whereas there was no limitation in the "*George Home*." But I cannot view that limitation in the light in which it has been represented. That limitation appears to me in no degree to apply to the question at issue, which is, not how long the sailors might

MAY 4. justly be detained in the service, but in what part of the world the service was to be performed.

Westmoreland. Finally, I have to consider the effect of the statute which has passed since the decision in the case of the "*George Home*." The difference between the two statutes is, that by the former, that of George 2, it was necessary to state in the articles the voyage on which the seamen were to proceed. By the recent statute, the word "voyage" has undergone this alteration, that, in lieu of it, "the nature of the voyage" has been substituted. Now I must presume that this was done advisedly, and I must give a rational construction, in conformity to the import of that alteration;

which relaxes the former.

and I must consider these words as relaxing the strictness of the obligation before imposed. But the question is, to what extent? In my opinion, to such an extent as may accord with the reasonable convenience of trade, and, at the same time, afford the mariner as much certainty as to the import of the contract as is consistent with that convenience. There is no other standard, in my judgment, by which I can try the true meaning of this statute. On the one hand, I am bound to consult the interests of the mercantile world; on the other, to give the mariner such protection as is consistent with a due regard to those interests. Now, are these articles as explicit as the convenience of trade will allow? I am of

Articles not sufficiently explicit;

opinion they are not. I think that nothing could have been easier than to have specified, in clear and intelligible language, all that the owners could have desired to convey. Lord Stowell has, in the case which I have cited, explained how these objects might have been effected; but even had ulterior objects been entertained, how easy it would have been to express them so that there could have been no misunderstanding—to have said, "First to call at Great Britain for orders; if thought necessary, to proceed to a port of discharge in Great Britain or the north of Europe;" or, if it had been necessary, "the south of Europe." The words "nature of the voyage" must have such a rational construction as to ensure the main purpose for which they were inserted, namely, to give information. Terms such as

these give the mariner no information, no instruction whether he was to winter in the frozen regions of the north, or to perform easy service in the mild climate of Naples; whether he was to go to Russia, the Baltic, or the Mediterranean; or whether he was to remain at home. I am yet to learn that such comprehensive ambiguity is necessary for the purposes of trade, and if it is not necessary, it cannot be said that a just construction of this statute would impose any such service on the seamen. I am not disposed to narrow its interpretation in cases where the exigencies of commerce call for an extended latitude of construction; but I am inclined to say, that this statute does not warrant an arbitrary and unnecessary extension of terms, not required for the interests of the owners, and so vague and indefinite as to deprive the mariner of all the benefit intended for him when the Legislature ordained that such information should be conveyed to him of the extent of the operations in which he was about to engage. For these reasons, I am of opinion that the statute does not confer on these articles that validity which they certainly would not have possessed if they had been framed before the period when the statute was passed, and not valid. and when the authority of Lord Stowell, in the case I have cited, stood perfectly and altogether untouched.

MAY 4.

Westmoreland.

Upon both grounds, therefore, it is my duty to pronounce my judgment in favour of the mariners, and, of course, I must decree costs as against the owners; and I cannot but lament that, seeing these persons—though I am ready to admit, very innocently on the part of the master and the magistrates—have suffered an unjust and illegal imprisonment, it has been deemed necessary to carry on the controversy in this Court for the purpose also of preventing them from receiving their wages.

Judgment for
the mariners,
with costs.

Consistory Court of London.

MAY 7.

MORGAN, BY HIS GUARDIAN, *v.* MORGAN.—*Cause.*—*Divorce by*
This was a suit by Mr. Herbert Morgan, a minor (proceed-
reason of adul-
tery.—The fa-

MAY 7.

Morgan v.
Morgan.

ther of a minor
and absent hus-
band appointed
curator ad litem.
— Sufficiency of
proxy. — Wilful
desertion by the
husband, no bar
to a sentence
against the
wife.

ing by his father, and guardian lawfully appointed), against Elizabeth Morgan, his wife, by reason of adultery by her committed. Mr. Herbert Morgan was born 17th May, 1820. and was now a cornet in the 15th Hussars, stationed at Bangalore, in the East-Indies. The Libel, which was admitted without opposition, pleaded that the marriage took place at Isleworth, on the 24th April, 1837, and that, at the time, the husband was sixteen and under seventeen, and the wife twenty-one and upwards; that the husband was at school with the Rev. Dr. Repton, at Ealing, and that the wife's mother kept the post-office there; that, immediately on the discovery of the marriage, Mr. Morgan was removed by his father from Dr. Repton's house, and in June, 1837, was sent to the Continent, where he remained till October, 1839, when he obtained a commission in the 15th Hussars, and proceeded to India, and that, by reason of the premises, there had been no cohabitation between the parties as husband and wife, and only stolen interviews; that, previous to the autumn of 1839, Mrs. Morgan resided with her mother at Ealing; since which time, she had carried on an adulterous intercourse with a person named Alexander Thorn, and that, in 1840, she was delivered of a child. A proxy, under the hand and seal of Mr. Herbert Morgan, appointing his father his guardian, was executed at Bangalore. No Plea had been offered on the part of the wife.

March 3.
ARGUMENT.

Haggard, D., for the wife, objected, in the first instance, to the proxy authorizing the proceeding, the invalidity of which would nullify the evidence taken in the cause. The suit commenced by an affidavit from Mr. Morgan, sen., stating the minority and absence of his son, and the Court allowed him to take out a Citation against the wife,* but coupled that permission with a certain condition, that, before sentence, a proxy should be produced from the husband, appointing his father guardian, and ratifying and confirming his acts. The application was, therefore, granted conditionally, in order that the Citation might issue and evidence be taken *de bene esse*, subject to the son's adoption, ratification, and confirmation of his father's acts. The in-

* See 9 *Monthly Law Mag.*, 126.

struments before the Court, giving the father a *persona standi* to have a sentence pronounced against the son's wife, are, a proxy of election from the son, dated 1st September, 1840, and a proxy from the father of acceptance of the guardianship, dated 18th November, at which time all the important witnesses had been examined. The former recites the marriage, the adultery, the minority of the husband, and the election of the father to be *curator* or guardian, more especially for the purpose of citing the wife in a certain cause of divorce or separation, and of carrying on the said cause (that is, of citing the wife), on the party's behalf, and authorizes him to appoint a proctor, and promises to ratify and confirm the proctor's acts. But it is not retrospective; there is no recognition of what had been done. The proceedings, therefore, have been without authority.

Pratt, D., on the same side. The authority of the proxy is strictly confined within the limits of it, and therefore merely authorizes the citing of the wife to answer.

Sir J. Dodson, Q. A., for the husband. The party in this case is not an infant, but a minor; the proper course in such a case is, that the guardian should be elected by the minor, and confirmed by the Court. The reason why the Court appoints a guardian, in the case of an infant or a lunatic, is their inability to elect, and if we shew that the minor was, by reason of absence, unable to elect, at the time of proceeding, the Court will appoint a guardian. When the proxy of election was sent out to the East-Indies, the suit had not commenced; the father had not been appointed guardian by the Court. The proxy is not only for instituting but for "carrying on" the suit, and this appointment took place before the witnesses were examined. An action for damages has been brought in a court of law against Mr. Thorn by the father, as guardian of the husband, and though an objection was raised by the Counsel for the defence, the Court of Exchequer held that the action was rightly brought by the father as guardian of his son. There has been no appearance under protest on the part of the wife, who sustains no injury; the witnesses are cross-examined on her part, and after publication was prayed by

MAY 7.

*Morgan v.
Morgan.*

Proceedings
nullified by in-
sufficiency of
proxy.

Proxy is for
"carrying on"
suit.

No appear-
ance under pro-
test.

MAY 7.
 —
Morgan v.
Morgan.

Mr. Morgan, she asserted an Allegation, but gave none. My argument is, that the Court appointed the father guardian, and that the appointment has been confirmed by the election of the son and the subsequent acceptance by the father.

Addams, D., on the same side.

JUDGMENT.

DR. LUSHINGTON. —I see no reason to repent the course I pursued in this case. I apprehend that, on the facts stated in the affidavit—that the son was a minor, and resident in the East-Indies, the father residing in England, and that the wife was supposed to have committed adultery—it was the duty of the Court to interfere and prevent a failure of justice; for if the Court had declined to do so, it might have been (assuming the charge to be well founded) that the whole of the evidence would be lost, or difficult to be procured, before the husband could have duly authorized the commencement of proceedings. My impression, therefore, was, that justice required me to authorize the commencement of proceedings; but, at the same time, what I wished to do was, to prevent the party from being prejudiced by his absence in the East-Indies, and from being concluded by any acts of his father during his absence. I, therefore, expressly stated that I should require from the son, before I gave my final judgment, a confirmation of the proceedings instituted under the direction of his father.

The proceedings two-fold.

These proceedings may be divided into two parts; namely, the proceedings had immediately in consequence of the father's instituting the suit, without the knowledge of the son, and those which the father afterwards carried on in virtue of the proxy executed by the son in the East-Indies. With regard to the first, it is said, that they do require the confirmation and approval of the son; with respect to the second proceedings, carried on by virtue of the proxy executed by the son, appointing his father guardian, that they do not require any further confirmation. The objection is, that the proxy is not a sufficient compliance with what the Court required, namely, a confirmation by the son of all the proceedings.

Proxy not retrospective.

The proxy is not, it is true, retrospective; but it is a

proxy executed, to all intents and purposes, with the view of the father's obtaining a divorce for the son by reason of his wife's adultery, and it is very clear, in my judgment, that it goes indirectly to confirm every thing previously done. In strictness, I have no hesitation in saying, that the proxy ought to have set forth the institution of the suit by the father, stating what the Court had directed, and have gone on to confirm all that had been done and should have been done by the father under the direction of the Court. But the question now raised is, whether, evidence having been taken on this proxy, it is or is not a sufficient consent to authorize the Court to hear the cause. I recollect, in *Fraser v. Fraser*, though it occurred twenty-four years ago, what fell from Lord Stowell. In that case, the brother of the party instituted the suit as his agent, under a power of attorney, and Lord Stowell declared he would not sign the sentence unless "the proceedings were confirmed by the brother himself." I have not had an opportunity (not being aware that this objection would be taken) of examining the proceedings in the case with minuteness; but I think it comes to this: whether the proxy is sufficient or not to justify the Court in signing a sentence of separation; if not, still I ought to proceed to hear the cause, because if I am satisfied that the husband is entitled to a separation, the Court might delay signing the sentence till a confirmatory proxy is received. I think, therefore, I need not decide on the objection in the present stage, but may proceed to hear the cause, reserving the point till I give my judgment on the whole case.

MAY 7.

Morgan v. Morgan.

Should have confirmed past acts expressly.

Lord Stowell,
in *Fraser v. Fraser*.

Proxy sufficient to justify Court in hearing the cause.

The argument turned on an objection to the evidence of two witnesses, on re-examination, as to facts which occurred subsequent to their first examination (which was overruled); and on the proof of identity of the wife with the party charged, which the Court held to be sufficient.

In the course of the argument, the Court, addressing the Counsel for the husband, said: "Assuming that the marriage took place in April, 1837; that the ages of the parties were, the husband seventeen, the wife eighteen or nineteen; that

ARGUMENT.

PER CURIAM.

MAY 7.

*Morgan v.
Morgan.*

Wife abandoned.

ARGUMENT.

Husband dependent, and sent abroad.

there was a cohabitation for only a few days, when the husband was sent away and the wife abandoned; that it is not pleaded that she had any maintenance, and that the adultery was committed in the Autumn of 1839, two years and a half after the marriage, no action for damages being pleaded; under these circumstances, you must satisfy my mind, that I ought to pronounce a sentence of separation."

Sir John Dodson, Q. A. The husband had not the means of supporting his wife. He was and is a minor, dependent upon his father, who sent him abroad; he did not go voluntarily; and he has only a cornetcy, which does not enable him to assist his wife. Even where there has been a wilful desertion, that has not operated as a bar to the remedy. *Reeves v. Reeves.* Sullivan v. Sullivan.†*

MAY 7.
JUDGMENT.

Sufficiency of proxy.

DR. LUSHINGTON.—Some preliminary objections were taken at the time this case was discussed, but which do not require any extended observations. The first is, as to whether the suit has been so conducted as to justify the Court in pronouncing a decision upon the merits.

The suit was commenced by the father of the husband, a minor and in India, who was allowed to carry on the suit in his behalf. I am of opinion that the Court was authorized to take this step, both by former precedents and on principle, to prevent a failure of justice. With regard to our own proceedings, a father, as guardian, like the committee appointed in cases of lunacy, is, in a case of minority, permitted, though he cannot be compelled,‡ to institute proceedings. In cases of absence, my predecessors have been anxious to prevent the mischiefs which might arise if great delay were interposed. Thus, in *Fraser v. Fraser*, a brother was allowed to commence proceedings as guardian on a power of attorney; these Courts being anxious to prevent the injury arising from the absence of parties to protect their own interests. If there were no means of proceeding immediately in such cases as these, evidence might be lost, and parties might be deprived of remedy. It is not suggested that any real injury can result to the party pro-

* 2 Phill. 125.

† 2 Add. 299.

‡ *Beauraine v. Beauraine*, 1 Hagg. C. R. 498.

ceeded against, for she has the same means of defending herself; and of cross-examining witnesses, and of pleading and of producing witnesses on her plea, and if the answers of the other party were required, the Court has the power, and would exercise the power, if the ends of justice demanded it, of suspending its decision till those answers were produced.

In this case, as in the case of *Fraser v. Fraser*, the Court required that the proxy of the husband should be produced before sentence, in order that it might have the usual assurance that all that had been done had received the approbation of the husband, and that he sanctioned the proceeding. I had some doubt as to the form in which the proxy ought to be, and I inclined at the first blush to think that it could not be merely authorizing the suit to be instituted and carried on in the Ecclesiastical Court, but that it ought to be confirmatory of all previous proceedings, and I was more impressed with this consideration from the case of *Dennis v. Dennis*—not the case usually cited under that name, but the case of *Dennis v. Dennis*, also in this Court, in February, 1815—which was a suit of a father during the minority of a son, as guardian *ad litem*, for nullity of marriage by reason of minority and want of consent. Previous to sentence, an objection was taken on the ground that there had been no proxy from the husband. The Court directed the case to stand over for a proxy to be executed by the husband, confirming what had been done by the promoter; and the Court overruled the objection, and pronounced the marriage null and void. And I see an observation, in my note of the case, as falling from the Court: “Had the suit been by a testamentary guardian, and not by a guardian *ad litem*, *quare* if any proxy necessary at all.” In that case, the whole of the proceedings had been brought to a conclusion before any proxy was required or produced by the party proceeding for the minor. In the present case, the suit had been commenced, and then comes a proxy, when witnesses are examined, and the case goes on. And it comes to this: whether, the proceedings having commenced without any proxy at all, and a proxy being then brought in, but which

MAY 7.

Morgan v.
Morgan.

MAY 7.

*Morgan v.
Morgan,*

is not confirmatory of all that had been done before—this is a fatal objection. But I find in *Fraser v. Fraser*, the case I have already alluded to in this Court, where a brother had been permitted to sue under a power of attorney, the proxy ultimately executed was not confirmatory of all that had taken place, but simply to carry on proceedings. Now it appears to me, in the first place, that, unless there is some very strong reason, I should hardly be disposed to come to a decision in opposition to the authority of Lord Stowell; and in the second place, that it is sufficient for all the purposes of justice if the proxy be confirmatory of every thing done on the behalf of the party thereafter. For the reasons I have stated, as I find that, in both cases, the proxy was in the same form, I am of opinion that there is not any legal impediment to the Court's proceeding to consider the merits of the case.

A prospective proxy sufficient.

Identity of the wife,

of . The next objection is, that the identity of the party is not established by evidence, the proof of which must, *ex rerum natura*, be an essential part of the case. In all these cases, the identity must be proved with respect, first, to the marriage; secondly, to the sexual connexion; and thirdly, with reference to the defendant in the suit. It is obvious that, without proof of identity on these points, there can be no cause of divorce brought before an ecclesiastical tribunal. If the identity of the parties as to the marriage is not proved, the *substratum* of the case has failed; if the identity as to the adultery is not established, no offence is proved; if, therefore, there is a deficiency of evidence as to these facts, there is no suit before this Court between married persons. For these reasons, it is of essential importance that the identity should be fully and satisfactorily established. I am perfectly satisfied that the fact of identity is proved to the extent which the law requires, and the case is so free from doubt, that it would be a waste of time, and can answer no good purpose, to state the evidence in detail.

sufficiently proved.

Adultery admitted.

I come, therefore, to the merits of the case; and first, I observe that the adultery (subject to the preceding objection as to the proof of identity) is admitted, and, indeed, cannot be doubted. The marriage took place at Isleworth,

on the 24th April, 1837, Mr. Herbert Morgan being then not quite seventeen. As to the age of Elizabeth Morgan at the time, there is no evidence which enables the Court to fix it with precision. From the best testimony, it appears that Elizabeth Lawford was at the time of the marriage eighteen or nineteen. There was, therefore, no great disparity in their ages; but, as to their relative stations in life, there was a great disparity. Mr. Morgan, who was at school, had very great expectations from his father and grandfather; Elizabeth Lawford lived with her mother, the post-mistress, at Ealing. There is no evidence whatever of any proceeding on the part of the mother, by advice or assistance, to promote the marriage, nor is there any evidence of any misconduct on the part of Mrs. Morgan herself previous to the marriage, or of any deviation from the path of virtue, till the autumn of the year 1839, two years and a half after the solemnization of the marriage. The marriage was clandestine, and, therefore, in fraud of the father's rights; but, nevertheless, in point of law, it is a legal marriage; it was obligatory upon both parties to fulfil their marriage vows; he was bound by his solemn declaration "to love her, comfort her, honour and keep her in sickness and in health, and to keep only to her, as long as they both shall live." That is the obligation which the law has made his part of the contract—and although the husband was a minor, he is not relieved from it on that ground: let us see how it has been performed.

In a very few days after the marriage, the husband (no doubt by parental authority) was sent to the Continent, and subsequently to India, where he now is. That the smallest consideration was paid to the wife, either for her protection, or for her maintenance in any other way, there is not the slightest evidence. She, a girl of nineteen, of great personal beauty (as stated by all the witnesses who have been examined in the cause), recently married, is at once thrown—I will not say to the risk, but—almost to the certainty of destruction. It is no part of my duty to impute moral blame where there is no direct proof; but it is my duty to state facts, and to draw the necessary conclusion.

MAY 7.

—
Morgan v.
Morgan.

Marriage legal, although clandestine.

Conduct of the husband.

Wife abandoned in a few days.

MAY 7.

*Morgan v.
Morgan.*Consequences
to the wife.

To the wife, this marriage, followed up by a divorce, leaving her without any claim for maintenance, has proved utter ruin. I do not extenuate her guilt, but I cannot forget the situation of a young married woman, thus suddenly severed from her husband. To the husband, the consequences have been some expense, some trouble, exile from home for the period during which he has been in India (where the wife had no means of watching his conduct), and a judgment in this Court, by which (if it decrees a divorce) he will be absolved from all legal obligation of maintaining his wife, and it may be, an act of the Legislature dissolving the marriage-bond. It is but just to Mr. Morgan to say that, he being a minor, and dependent upon his family, it would be going too far to impute to him a voluntary and wilful abandonment of his wife.

Is such conduct a bar to divorce?

Under these circumstances, am I to consider that his conduct is a bar to the divorce? Is the violation of the marriage obligation on the part of the wife to be followed by no penal consequences?

A deserted wife, without legal remedy.

The law of England gives no direct remedy to a deserted wife, whose husband chooses to reside abroad. She may pledge his credit for necessaries, but she has no right to resort to a Court for a direct remedy. But this contributes in no degree to solve the question; for it does not follow that, because she cannot avail herself directly of legal aid, she has a *quasi* license to commit adultery. I have not been able to find a single instance of a decision in the Court of Arches, or in the Consistory Court, in which this point is determined. I find in one case some strong observations by

Lord Stowell, on the duty of a separated wife, in *Denniss v. Denniss*.

Lord Stowell, as to the duty imposed upon a wife even in case of a separation. I have a note of what fell from Lord Stowell in *Denniss v. Denniss**—not the case I referred to before, but the case in the Consistory Court. In the Court of Arches, two cases were cited in the argument, *Reeves v. Reeves* and *Sullivan v. Sullivan*.† In these two cases, the learned judge declared that there was no wilful and delibe-

* Consistory Court, 25th January, 1806; cited in 1 Hagg. C. R. 446.

† The same case which is reported, in the Consistory Court, in 2 Hagg. C. R. 236.

rate desertion ; so that in those cases there was no decision on the point. But I find, on looking to my own note-book, that, on the admission of the Allegation in *Reeves v. Reeves*, Sir John Nicholl expressly declared that, by the law of England, wilful desertion of a wife was no bar to a suit against her for adultery ; and I find this doctrine of law emphatically repeated in *Sullivan v. Sullivan* ; his words are : " I am still to learn that even a malicious desertion of a wife by the husband is any bar to a sentence of divorce prayed by the husband for adultery committed by the wife."

MAY 7.

Morgan v. Morgan.

Wilful desertion no bar to suit against a wife—per Sir John Nicholl.

Here, then, are two cases in which the doctrine has been repeated by Sir John Nicholl, and although they are not to be considered precisely in the light of precedents, as the cases did not require the decision of the point, they are authorities of the highest weight, not only as coming from the judge of a superior Court, but from a judge of the greatest learning and experience. The present case cannot be carried beyond wilful desertion, and I think I am bound to adhere to this doctrine, and not speculate on the consequences of particular cases. I must administer the law as I find it, and not presume to say that, in a particular case, the punishment affixed by the law will fall (as in most general laws it often does) with undue harshness on a less offending individual. I pronounce for the divorce.

Sentence of divorce.

On the last session of Trinity Term, in the case of *Sewell v. Sewell*, which was a suit by Major Sewell, resident in India, against his wife, resident in England, for a separation by reason of her adultery, the question of the sufficiency of the authority from the husband arose, upon the Court's inquiry, previous to signing the sentence. The case of *Morgan v. Morgan* was referred to, as well as *Fraser v. Fraser*, and a later case of *Trower v. Trower*, neither of which cases is reported. The Judge directed the papers in both cases to be brought into Court, when it appeared that, in *Fraser v. Fraser*, the suit originally commenced by virtue of a proxy executed by Mr. James Fraser, as attorney of his brother, Mr. Simon Fraser, the party suing, who resided in Java ; that the proceedings went on, and that there was in fact no proxy expressly ratifying past acts. In *Trower v. Trower*, there was a power of

DEC. 18.

Sewell v. Sewell.

Sufficiency of authority.

MAY 7.

—
Morgan v.
Morgan.

attorney authorizing certain persons to commence proceedings on the part of the husband, ratifying and confirming what the attorneys had done, and agreeing to ratify and confirm what they should do. This power was followed *mutatis mutandis* in the case of *Sewell v. Sewell*.*

JUDGMENT.

DR. LUSHINGTON.—The power was quite sufficient in *Trower v. Trower*, for it was shaped to meet a suit about to be brought, and to obtain a sentence. The distinction between the present case and that of *Fraser v. Fraser* is, that, in the latter, the proceedings were commenced by the brother of the party, who had no special authority for the purpose; but Lord Stowell, in aid of justice, and to prevent the evidence from being lost, allowed the suit to go on, and said he should require a proxy before sentence. The proxy, when it came, was a direct proxy, appointing a proctor; but in

* The power in *Sewell v. Sewell* was as follows: "Whereas my wife, M. S. S., is and hath been for some time resident in England, together with my four children, and whereas reports have been circulated affecting the conduct and character of my wife during such her residence in England, and I have deemed it proper to cause inquiries to be instituted to ascertain the truth or falsehood of such reports, and the result of such inquiries may render necessary the immediate removal of my children from the custody of my wife, and the institution of various legal proceedings, and I am desirous of appointing some person or persons in England to act for me in this behalf during my absence; now know ye that I have made, ordained, constituted and appointed, &c., J. G. and C. B. jointly and severally my true and lawful attorneys for me and in my name, &c., to demand, receive and remove my children from the custody of my wife or any other person or persons in whose custody they may happen to be, and for that purpose to sue out any writ or writs of *habeas corpus*, or take any other legal proceedings, &c., and to take charge of my children and to place them in the custody or care of any person whom my attorneys may in their discretion think proper; and also for me and in my name to commence, prosecute, carry on or defend all such actions, suits or other proceedings either at law or equity, or in any Ecclesiastical Court, against my wife or against any other person or persons as my attorneys may think proper, and the same actions, suits or proceedings to compromise or discontinue, and fully for me and in my name to do, execute and perform all and any other act and thing needful and expedient in and about the premises, as fully and effectually to all intents and purposes as I could do if I were personally present, I hereby ratifying and confirming, and agreeing to ratify and confirm, all and whatsoever my attorneys shall lawfully do or cause to be done, or shall lawfully have done or caused to be done, in and about the premises, &c."

fact there was another proxy, though it was not brought to Lord Stowell's notice, a proxy *de futuro*: it passed *sub silentio*, and was considered as if it was a proxy ratifying preceding acts. I think, in this case, I am justified in pronouncing sentence.

MAY 7.

Morgan v.
Morgan.

Prerogative Court of Canterbury.

MAY 12.

GOLDIE v. MURRAY.—*Motion.*—This was a suit for proving in solemn form the last will of Mr. John Kilpatrick, who died 4th August, 1840, by Mr. James Goldie, one of the executors named in the will in question, dated 1st August, 1840, against Mr. Adam Murray, one of the executors under a will of July, 1839. The will of 1840 had been propounded in a *condidit*, on which two witnesses had been examined. An Allegation on behalf of Mr. Murray had been admitted, and witnesses had been examined upon it. On the 12th February last, Mr. Goldie had become a bankrupt, and his estate was in the hands of assignees, on behalf of his creditors. An application was now made, on the part of Mr. Murray, that the Court would direct security to be given for his costs.

A party in the cause, becoming bankrupt, required to give security for costs.

Sir J. Dodson, Q. A., in support of the application, cited the 12th rule of these Courts, and shewed that, in the courts of law, an uncertificated bankrupt was required to give security for costs, from *Webb v. Ward*.* *Heaford v. McKnight*.†

ARGUMENT.

Practice in courts of law.

R. Phillimore, D., on the same side, cited *Tidd, N. Prac.*, 268. *Mason v. Polhill*.‡

Addams, D., in opposition to the motion. The doctrine of the Common Law Courts is, that the person benefited by the suit should find security for costs; but that is not the rule of these Courts, where the case depends upon its circumstances. Mr. Goldie is a nude executor, and the bulk of the property is left to charities in Scotland. The application is premature. The creditors came to no resolution whether or not they would go on with the suit.

Rule in these Courts different.

* 7 T. R. 296.

† 2 B. & C. 579.

‡ *Crompt. & M.* 620.

MAY 12.

*Goldie v.
Murray.*

JUDGMENT.

SIR H. JENNER.—The will in this case was propounded by Mr. Goldie, the executor, in a *condidit*, on which he has examined the two subscribed witnesses. An Allegation was then given in by Mr. Murray, as executor under a former will, which, after debate and reformation, was admitted by the Court; the answers of the party to it have been taken, and witnesses have been examined upon it. Publication was prayed, but was stopped by the assertion of an Allegation on behalf of Mr. Goldie, and it stood for admission the next Court-day, and some expense must be incurred on account of this Allegation and of the examination of witnesses upon it. But Mr. Goldie, the party in the cause, has become a bankrupt, and it is stated that a meeting of the assignees and creditors has taken place to determine whether the suit should be carried on in the name of the bankrupt, to support the will so propounded. On the other hand, it is prayed that, under the circumstances, security may be given for the costs of the other party, which may be incurred thereby. Now it appears to me, that this is a case in which, if there is a rule of Court to such effect, and if the Court is at liberty to direct security to be given, it should make such an order. Mr. Goldie is a person without property; whatever interest he may have under the will is, *prima facie*, for the benefit of the assignees, who take possession of his property, to be divided amongst his creditors hereafter. What, then, is the Court to do? It cannot decree the assignees to give security for the costs, because they are not before the Court; I can do no more than direct Mr. Goldie to give security, and if the assignees see fit to carry on the suit, they must find security for him. The suit must be carried on in his name, and in case the Court shall be of opinion that he has failed in support of the will, and that it was improperly obtained, and should condemn him in the costs, the other party would, without security, have no means of recovering them. I think that this is one of those cases in which the rule of Court ought to be acted upon, and that security for costs should be given. Let security be given in the amount of £250.

This is a case
for security.

The party is
without pro-
perty.

The assignees
must find secu-
rity for him.

Security re-
quired.

IN THE GOODS OF ANNA ELEONORA PHILLIPS, DEC.—
Motion.—The testatrix died on the 16th April, 1841, leaving a will dated 4th August, 1840, whereof she appointed three executors; it was regularly attested according to the requisites of the statute. In the will, reference was made to a schedule of certain articles, which schedule was to be found with the will, but no such document was so found, and the executors had sworn that the paper was in the same plight and condition as it now appeared. In the will were several alterations and interlineations, one only being of any importance. In a bequest of £200 stock to two persons, the word “each” was interlined; and the subscribed witnesses could not tell whether this alteration was made at or before execution.

MAY 12.

Interlineations in a will pronounced for.

Bayford, D., moved for probate of the will as it stood.

SIR H. JENNER.—Some of these alterations are mere corrections, by striking out words of repetition, which is a circumstance to shew that the deceased, after executing the will, read it over, and expunged what she deemed superfluous, and added what was necessary to carry her intentions into effect. In one alteration, however, the deceased purports to bequeath £200 stock in the Three and a half per Cents. to E. and M. T., in trust for the education of their two sons, and for no other purpose whatever. In this legacy, she has interlined the word “each,” which would convert the bequest from £200 between the two sons, to £200 each, or £400 between them. On looking to the context of the will, I think it is impossible not to see that the deceased intended to give £400 to these legatees, for she purports to dispose of £1,000 stock in the Three and a half per Cents., and having given three legacies of £200 of that stock *each* to three persons, she goes on to bequeath the legacies in question, which, if they amounted to £400, would exhaust the amount of stock, whereas if they were £200 only, there would be £200 left. I am quite clear that the testatrix intended to give £400, and I think it probable that, in reading the paper over, she made the alteration either immediately after it was written (for it is done apparently *currente calamo*), or at least before the execution. Under these circumstances, I

JUDGMENT.

Circumstance to show reading over.

Inference from context;

and also from amount of property.

Alteration apparently *currente calamo*.

MAY 12. have no doubt in decreeing probate of the paper as it now stands. The other alterations are in effect merely to make the sense more clear, so that every circumstance tends to shew that these alterations were made shortly after the will was written, probably at the time it was written, and before it was executed. Decree probate of the paper as it now stands.

Philips, dec.

To make the sense clearer.

Probate as it was executed. Decree probate of the paper as it now altered.

* * There were no admissions of Advocates or Proctors this Term.

END OF EASTER TERM, 1841.

JUNE 4.

Burderv. Speer.

TRINITY TERM, 1841.

Archies Court of Canterbury.

JUNE 4.

THE OFFICE OF THE JUDGE PROMOTED BY BURDER *v.* SPEER.—*Cause.*—This was a cause of office promoted by Mr. John Burder, secretary to the Bishop of Winchester, against the Rev. Wilfred Speer, perpetual curate of Thames Ditton, Surrey, “for being an habitual drunkard, and for having been repeatedly guilty of the crime of drunkenness, and also for having been frequently guilty of indecent conduct, demeanour, and language, in the church of the perpetual curacy, as well in and during the performance of divine offices and services in the church as before and after the performance of such divine services and offices.” The suit was brought by letters of request from the commissary of the Bishop of Winchester.

Charge of drunkenness against a clergyman sustained — sentence of suspension. — (Interrogatories).

The Articles alleged that the defendant, having been for four years a minister in holy orders of the Church of England, was licensed, in March, 1835, to be perpetual curate of Thames Ditton, and that ever since his entrance on the spiritual duties of the perpetual curacy, he had addicted himself to the immoderate use of wine and spirituous liquors, and been in the habit of frequenting the *Swan*, a public house or small inn in Thames Ditton, and there drinking to excess, thereby becoming intoxicated, to the great scandal and offence of his parishioners and others; that he had also been in the habit of performing divine service in the church in an indecent and irreverent manner, and had thereby and otherwise by his indecent demeanour and conduct in the church, during the performance of divine service, caused great offence and scandal to his parishioners and other persons assembled for the purpose of Divine worship, and had by such conduct and demeanour driven many of his parishioners away from attending the church; that, during the time of Divine service on Sunday morn-

JUNE 4. *Burderv. Speer.* ings, he had been constantly furnished, from the *Swan*, with a bottle of port wine, or with some brandy, which he had invariably drunk in the vestry-room of the church during the service; that on many of such occasions he had thereby become, and evinced by his conduct and demeanour that he was, intoxicated, and had been scarcely able, by reason of such intoxication, to get through the service, or preach his sermon, to the great scandal and offence of the congregation; that on a Sunday morning in July or August 1836, during the reading of the prayers, he was, and by his conduct and demeanour evinced that he was, in a state of intoxication, and totally unfit to finish the service, and that such his state and condition were evident, and occasioned great scandal and offence to the congregation; that on that occasion, at the end of the communion service, Sir C. Sullivan, Bart., a captain in the royal Navy, and a parishioner, being present, and observing the defendant's state and condition, called Mr. Leonard Seeley, the churchwarden, who proceeded into the vestry, where Mr. Speer was, and remonstrated with him, and urged to him that by reason of his intoxication he (the defendant) was in an unfit state to proceed with the service; that Sir C. Sullivan, who went into the vestry, also represented to him his unfit state, and offered to take upon himself to say the congregation would willingly dispense with the sermon; after which the defendant said, "Do you think they will excuse the sermon?" and eagerly adopted the suggestion, and that accordingly, with Mr. Speer's full concurrence, notice was given in the church that there would be no sermon, and there was none on that occasion; that in the afternoon of a day in the summer of 1836 (whilst the church was undergoing repair), the defendant called on Captain Williams, a parishioner, in a state of intoxication, and on leaving his house, in attempting to mount his horse, he put his foot in the stirrup, but, in lieu of seating himself in the saddle, he, by reason of intoxication, fell over the other side into the middle of the road; that on Sunday, the 25th of March, 1838, on occasion of christening the child of a parishioner named William Karn, the defendant read the service in an indecent manner, so as to be almost unintelligible, being, and evincing by his conduct and demeanour that he was, in a state of intoxication; that after the christening was over, William Karn gave him the regular fee, and on the parties leaving the church, the defendant called them back again, and held up the money, saying, "Look'ee here at his fee," and remarked, "that clergymen were said to rob the poor; this does not look like it;" and then and there otherwise conducted and expressed himself in a manner inconsistent with and

unbecoming to the occasion, time, and place, and so as to evince that he was (as in fact he was) in a state of intoxication; that in the afternoon of one Sunday in July, 1838, the defendant read the prayers in a very irreverent and unseemly manner, and it was with extreme difficulty he was able to preach his sermon, and that on such occasion he was, and evinced by his conduct and demeanour that he was, in a state of intoxication; that on the morning of Sunday, the 12th August, 1838, he performed Divine service in a very irreverent and indecent manner, making a great many mistakes, and being scarcely able to get through the duties of the service, owing to intoxication; that in the afternoon of Sunday, the 10th of March, 1839, the defendant was in a state of intoxication, reading the prayers in the church, and preaching the sermon, in such a manner as to be almost unintelligible, and as he proceeded he became more intoxicated, and at last, by reason of such intoxication, sank down in the pulpit, and was unable to give the blessing; that by his indecent and disgraceful conduct, demeanour, and language, the defendant had given great scandal and offence to the parishioners and inhabitants of the parish, and complaints having been made to the Bishop of Winchester, his lordship directed the rural dean to inquire into their truth, and upon a report of the result of his inquiry the present proceedings were instituted.

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Burdett v. Speer.

From the decision of this Court, admitting the Articles, the defendant appealed to the Judicial Committee of the Privy Council, which affirmed the decision with costs.

Appeal from admission of the Articles.— Sentence affirmed.

On the remission of the cause, the defendant brought in a defensive Allegation, which counterpleaded the general charge, that the defendant had, since his entrance on the spiritual duties of his curacy, addicted himself to the immoderate use of wine and spirituous liquors, "as falsely articulated in the third of certain (pretended) Articles admitted (howsoever) on the part of the promoter," and denying that he had been in the habit of frequenting the *Swan*, "a respectable inn, much frequented by anglers," or of drinking there to excess; counterpleading and denying also that he had been in the habit of performing Divine service in an indecent and irreverent manner, or had caused offence or scandal to his parishioners or others, or driven his parishioners away from church; and pleading that Mr. Speer (who was, and is, of a weak and sickly constitution, and naturally of a nervous and sensitive temperament) had occasionally, whilst officiating on Sundays, taken a glass or two of wine in the vestry-room, at intervals (without which he could not have gone through the fatigue of his

Defensive Allegation.

JUNE 4. duty), but had never thereby become intoxicated, or scarcely able to get through the service or preach; that his drinking of brandy in the vestry-room was limited to a single instance, in which, being deplorably sick, and nearly fainting, he had a small glass of that liquor procured, of which he drank only about one-half; it denied the substantial accuracy of the Article which pleaded that the defendant was intoxicated on a Sunday morning in July or August, 1836, when Sir C. Sullivan interfered, and it pleaded the facts to be these: that on Sunday morning, the 4th of September, 1836, Mr. Speer was taken seriously ill, but, knowing no clergyman on the spot who could officiate for him, he officiated himself, though extremely fatigued; that whilst in the vestry-room, during the singing of the psalm between the communion service and the sermon, he was found there by Sir C. Sullivan and Mr. Seeley, the churchwarden, with a glass of water in his hand, which he was sipping, and almost in a fainting state, who persuaded him, as with reference to his obvious indisposition, not to attempt to preach, and that on Mr. Speer saying, "But won't the congregation think I neglect them?" Sir C. Sullivan and Mr. Seeley replied, "No; every one will see that you are seriously ill;" whereupon Mr. Speer went home in a fly, accompanied by Mr. Seeley, whom he sent on in the fly to Dr. Roots, his medical attendant, for his immediate attendance, who accordingly visited and prescribed for him early in the afternoon of that day, and expressly pleaded that neither Sir C. Sullivan nor Mr. Seeley, at that occasion, reproached Mr. Speer for being, nor intimated any suspicion of his being, in a state of intoxication; that Mr. Speer's falling, in attempting to mount his horse at the door of Captain Williams, was caused by the horse's shying, owing to which he lost his balance, and fell upon the near side of the horse, which was one accustomed to shy, and back, or wheel round, on being mounted, and was returned on that account to the dealer, from whom Mr. Speer had it on trial only, and it denied that the defendant was at the time intoxicated; it pleaded that he did not, at the christening of Karn's child, read the service in an indecent manner, or evince by his conduct and demeanour that he was intoxicated, and that though he might have expressed himself to some such effect on returning the fee, as usual with him on similar occasions, he did not express himself in the words pleaded, nor otherwise conduct and express himself unbecomingly; it counterpleaded the Article pleading the occurrence, in the afternoon of a Sunday in July, 1838, and pleaded that Mr. Speer was even more than usually out of health in the summer of 1838, and that if on any

Sunday afternoon in that summer he flagged in the course or towards the conclusion of his sermon, it was owing to indisposition, and not to intoxication; it also counterpleaded the Article alleging the occurrence on the 12th of August, 1838, and pleaded that it might be that he had some difficulty in going through the duty on that day; but that if it were so, it was owing to his state of health, and not to intoxication; it in like manner counterpleaded the Article alleging the occurrence on the 10th of March, 1839, and pleaded that Mr. Speer had been, on the previous Friday and Saturday, confined to his bed by illness; but on the Sunday morning, feeling better, he got up and went to church, went through the whole of the morning duty, though considerably fatigued thereby, and also the afternoon service, reading and preaching, dismissing the congregation with the usual blessing, though suffering severely from exhaustion, occasioned by his state of health, which might have rendered him inaudible to a part of his congregation towards the close of the service; denying that his manner of reading was owing to intoxication, and pleading that it was owing to exhaustion, proceeding from severe indisposition.

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The admission of this Allegation was not opposed.

In support of the Articles, many witnesses were examined, including Lord de Ros, Sir Charles Sullivan, Capt. R. E. L. C. Williams, of the Dragoons, Capt. G. R. Lambert, R.N., and Mr. Seeley, parishioners; the parish clerk, the late and present landlords of the *Swan*, and the master of the National School, who deposed to a variety of facts which led them to form opinions more or less conclusive of the defendant's habits of intoxication, in as well as out of the church.

Evidence in support of the Articles.

On the defendant's Allegation, amongst other witnesses,

Evidence for the defence.

Dr. William Roots, of Kingston, deposed, that he has known Mr. Speer from a boy, and since he became incumbent of Thames Ditton he has been the constant medical attendant of his family, and in frequent, almost constant professional intercourse with him. He never, of his own observation, had reason to believe him to be addicted to the immoderate use of spirituous liquors, though he never sat down at table with him. He knows his constitution thoroughly; he is naturally weak and sickly, and of a highly nervous and sensitive temperament; for some years past, he has been labouring under a deranged performance of the biliary system, which has induced a state of great nervous excitement, so that

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slight and common occurrences have thrown him into a state of agitation, having the appearance almost of a person labouring under intoxication; and the witness has remarked, that a person not acquainted with Mr. Speer, seeing him in that state, might have thought him so. He has always been unequal to much fatigue, and for some years past he has been in such a state of health, as to render it very likely that, without some stimulant, such as wine or nervous medicine, he would at times have difficulty in getting through the church service. He has expressed his fears to the witness lest he should "break down," and the witness has recommended him to keep some nervous medicine (he never absolutely recommended wine) at the church, to take when he felt overcome during service time, as a fillip or stimulant. With Mr. Speer's tendency to excitement, and peculiar state of health and temperament, a small portion of stimulating fluid might have a greater or more rapid effect on him than on the generality of persons, though he never had reason to attribute his state of health to such a cause; he never had a suspicion of the sort. The witness recollects being sent for in the morning of Sunday, the 4th of September, 1836 (which he can speak to from the entry in his books), when Mr. Speer had been taken ill in the middle of the service; he went to him and found him very ill, labouring under one of his usual violent bilious attacks; there was not a symptom of his being affected with intoxication. The witness was attending Mr. Speer and his family in the summer of 1838, and throughout the last five years he has been an almost constant invalid, liable to be knocked up by any exertion, and the witness has been constantly advising him to desist from performing his church duties. On interrogatory, the witness said that intemperate habits of drinking would produce symptoms similar, in some respects, to those exhibited by Mr. Speer; but he has known them evinced in cases where there could have been no such cause, as in delicate females. Speaking from his own observations, he has every reason to disbelieve that the symptoms of Mr. Speer were brought on by intemperate habits; but he has, within the last two or three years, heard from such respectable quarters reports of such being his habits, that he hardly likes to venture to swear to a decided disbelief of the fact. Since he heard those reports, and being put on his guard, he has watched Mr. Speer, and made inquiries of his family, and he does not know, nor has he any reason to suspect from his own observation or inquiries, as his medical attendant, that he does drink to excess habitually, or even occasionally.

Mr. John Dyer, of Thames Ditton, has been in the habit of

visiting and associating with Mr. Speer, at each other's houses, for the last four or five years, on the most friendly footing. Mr. Speer has not addicted himself, at any time since he knew him, to the immoderate use of wine or spirituous liquors; at dinners he has drunk under the usual quantity of wine taken by gentlemen. He never knew him to drink to excess, or saw reason to believe that he ever did so. On no occasion, when the witness has attended the church, has Mr. Speer performed the duty in an indecent or irreverent manner; his mode of delivery has sometimes been hesitating, which arose from his constitutional nervousness; he never heard it attributed to intoxication. On a Sunday in August, 1838, it might be on the 12th, he had great difficulty, apparently, in getting through the service; but the witness believes the averment, that he was intoxicated, to be utterly untrue. He made mistakes, but it was evident to the witness that he was labouring under great nervous debility.

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Mr. Charles Dyer, surgeon, and in habits of intimacy with Mr. Speer, deposed to the same effect as the last witness and Dr. Roots, as to the state of the defendant's health, and to his never observing any symptom of intoxication in him, or any proneness to indulge in wine or liquor.

The Rev. John Bluck, a temporary resident at Thames Ditton in 1837, and who resided at Hanworth, four miles off, in 1839, was in the habit of seeing Mr. Speer at church, and occasionally officiated for him. They exchanged visits at each other's houses, and had a good deal of intercourse together. Mr. Speer never appeared to be fond of wine, and a glass or two would affect him. He has known a glass or two of home-made wine have such an effect upon him as to make him look silly. He never saw him take a drop of spirits. He never saw any thing in Mr. Speer's conduct at church calculated to cause offence or scandal to any one. He was in a nervous, debilitated state of health. He never knew him to take more than two glasses of wine in the vestry, and never saw any effect produced on him by what he took there.

Samuel Doria, schoolmaster, has been acquainted with Mr. Speer ever since he has been perpetual curate, visiting each other, and had he been addicted to habits of intemperance, the witness must have known it, whereas he never saw any thing of the kind. He never witnessed anything indecent or irreverent in his demeanour or conduct at church, or anything which he considered likely to induce any one to stay away. He has known him to falter at the close of his sermon, which was owing to exhaustion through want of physical power, and nervousness.

JUNE 4. *Burderv. Speer.* plained all the appearances which had misled the witnesses into a notion that the defendant was labouring under intoxication; they had drawn erroneous conclusions from circumstances open to a different interpretation, and a court of justice would always put a candid construction upon doubtful facts, and give a defendant the benefit of any possible doubt. But if the witnesses for the defence were believed, there could be no doubt; and, unless habitual drunkenness were proved, the case failed. He called upon the Court to dismiss the defendant with his full costs.

Unless habitual drunkenness proved, case failed.

Curtis, D., followed on the same side.

JUNE 4. **JUDGMENT.** **SIR H. JENNER.**—The question in this case involves no nice considerations of law, but is merely a question of evidence,—whether it is sufficient to support the charges against Mr. Speer, or whether he has sufficiently rebutted them.

Charges impute an Ecclesiastical offence. No one can doubt that, if sufficiently established, the charges constitute an ecclesiastical offence of a serious nature; for habitual drunkenness, or even frequent drunkenness, in a

Drunkenness, in a pastor of a parish, highly penal. clergyman, who is pastor of a parish, and whose duty it is to set an example of sobriety and moral conduct to his parishioners, is a highly penal offence, involving very serious

Especially whilst engaged in performance of Divine worship. consequences on the person who is guilty of it. The offence is greatly increased, in some respects, when such habits are indulged in at the time the person is actually engaged in the performance of Divine worship, as pleaded in this case.

Representations having been made to the Bishop of the Diocese, he was called upon to take some steps to inquire, at least, into the truth of the complaints and representations, and he accordingly directed his Rural Dean to institute inquiries, and the result having been reported to the Bishop, his Lordship directed the present proceeding, in the name

Whether, in such cases, the Bishop should be promoter of the office. of his secretary. Whether (as observed in the Argument) it is usual or proper, under these circumstances, that the Bishop of the Diocese should be the promoter of the office, either by himself personally, or by his secretary, is not very material for the Court to inquire: I think there are circumstances in this case which might well justify a departure from the strict rule, even if the Court were inclined to say it would be better that the suit should have been instituted

by other parties. The persons specially pointed out as those more proper to have taken upon themselves the office of prosecuting, are two parishioners (Sir C. Sullivan and Mr. Seeley), whose evidence was highly important for the establishment of the charges, and I can hardly think, therefore, that it would have been prudent for one of them to be the prosecutor, and thereby to have deprived the cause of that which, *primâ facie*, would be the evidence of respectable witnesses. Other persons, it may be said, there are, who might have been (and usually are) promoters of the office of the Judge, in cases of this description, namely, the churchwardens of the parish; but one of the churchwardens, in 1840, is an important witness in the cause; the other, who had been in office for four years, had been appointed by Mr. Speer, and was employed, as a builder, by his father, a large landed proprietor in the parish, and as this was to be a proceeding against the son of a person who was his "best customer," it was hardly to be supposed that he would have taken a very active part in such a prosecution. Therefore, unless the Bishop of the Diocese had interposed, and directed these proceedings to be instituted, in the name of his secretary, I do not very well see how the case could have been brought here for legal adjudication. I therefore think that, whatever may be the case under ordinary circumstances, there is sufficient in the present not only to justify the Bishop in having directed these proceedings to be instituted, but, further, that he could not with any propriety have refused his interposition, after the complaints laid before him, and the result of the inquiry by the Rural Dean.

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The churchwardens usually promoters.

The Bishop justified under circumstances of this case.

It has been said, in the first place, that the whole of the prosecution is, in point of fact, without any foundation; that it originates in spite and malice; that the Bishop has been most grossly deceived, not only by the representations made to him, but also by the "mock inquiry," as it is termed, executed by the Rural Dean; and that, if he had been aware of the real facts of the case, he would never have directed the present proceedings. It is said that Sir

Prosecution alleged to be groundless and malicious.

JUNE 4. Charles Sullivan and Mr. Seeley have, in fact, instituted this suit against Mr. Speer from motives of private revenge. Possibly it may be so; it is possible that evidence may be adduced to make out a case of conspiracy, perjury, and subornation of perjury, against the gentlemen by whom this charge was made, and by whose evidence it is supported, and the party may, if he thinks proper, set up a case of this description. But the probability of such a case being made out, I think, must be very remote indeed, and the Court must look at the character of the witnesses, and the evidence adduced, with great care, before it can come to the conclusion that, out of fourteen witnesses examined in support of the Articles, two have been concerned in this conspiracy against a gentleman who, from his general character and demeanour, ought not to have been made the subject of prosecution: for it is represented, I have no doubt truly, that he is a person of popular manners; all the witnesses to Mr. Speer's general character speak of him as a man of mild manners, and amiable as husband, father, and child; attentive to the poor, and an extremely kind-hearted man. Now it is difficult to conceive that an individual, possessing so many amiable qualities, should have been selected as an object of such a "persecution," as it is termed, as this; and if we consider his additional claims on the attachment of the parishioners from the circumstance of his father and family residing in the parish, it would seem as if there must be something behind, which counterbalanced these good qualities in the opinion of the parishioners, and deprived the person possessing them of the influence he otherwise would have enjoyed in the parish of which he is the spiritual superintendent.

Burderv. Speer. Supported by perjury.

Improbability of such a case.

General character of the defendant, good.

The supposed persecutors. Who are the parties supposed to have taken this unfounded prejudice against Mr. Speer? They are persons of respectability, of honourable stations in life, upon whom (independently of the effect of these proceedings) no imputation has been cast, or attempted to be cast, and one would assume, *à priori*, that they would not have lent themselves to any proceeding derogatory to their general character, and so disgraceful to them; and when we consider what are the

grounds of the private revenge which is supposed to have actuated some of those individuals, I think it will turn out that they are totally inadequate to sustain such a charge. JUNE 4.
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The great objection raised to the admissibility of the Articles was, that they were laid so generally that it was impossible for the party to defend himself against the charges, and the Court did, when admitting the Articles, express some hesitation, or rather threw out a suggestion that it was desirable, if possible, that they should be more specific as to time and place. But the answer was, that where you plead habit and custom, it is almost impossible to specify the particular time and place when and where any particular act took place, so as to be tied down to give proof of them; and the Court was of opinion, that there was sufficient specification of some instances in which Mr. Speer was pleaded to have been in a state of intoxication to make the Articles admissible to proof. Undoubtedly, where charges of this kind are brought, the evidence must be clear and decisive; for wherever a party is criminally proceeded against, the Court is bound to give him the benefit of any fair and rational doubt as to the proof of the charges. With every due inclination, therefore, to give Mr. Speer the full benefit of any doubt—if any should exist—I proceed to examine the evidence in support of the Articles. Objection,
from the gene-
rality of the
charges in the
Articles.

Answer, —
where habit
and custom are
pleaded, diffi-
cult to specify
particular time
and place.

The *Swan* is proved to be a very respectable public house or hotel, and as far as the house is concerned, there is nothing which should call for any particular observation from the Court against Mr. Speer, for having occasionally had recourse to that house for the purpose of refreshment, or of reading the newspapers; but the question is, whether he has been in the habit of drinking there to excess, and thereby creating scandal and offence to the parishioners. The parish clerk, the landlord of the house, and the master of the National School, have been examined. The former states that he has seen the defendant "under the influence of liquor" (making a distinction, as other witnesses do, between that and "a state of intoxication"), and that he had given occasion to scandal. The landlord of the *Swan* de- Evidence in
support of the
Articles.

Intoxication
at the *Swan*.

JUNE 4. poses that he very often saw Mr. Speer in a state of intoxication ; that he has seen him frequently become intoxicated at his house, and that on two or three occasions, he came there so intoxicated that he declined to serve him with liquor. The other witness deposes to his having seen him at the *Swan* intoxicated, and drunk frequently at church, and to his being "an habitual drunkard." Mr. Seeley also says he has seen Mr. Speer frequently in a state of intoxication, and that he is "an habitual drunkard." Upon the Article charging generally drunkenness and indecent conduct and demeanour at church, during the performance of Divine worship, thirteen witnesses have been examined, persons of respectability, not likely, *primâ facie*, to state what they did not honestly believe. The fact of Mr. Speer being supplied with a bottle of port wine from the *Swan* almost every Sunday, is proved beyond all doubt by the landlord, who supplied it, and charged it to Mr. Speer, who paid for it; and by the beadle, who brought it from the *Swan*, and states that Mr. Speer consumed at least a part of it—sometimes he took a half-pint tumbler of hot wine and water between the prayers and the communion service, and another tumbler, half wine and half water, in the interval between the communion service and the sermon: no brandy was furnished, except on one occasion, when a very small quantity was drunk. Whether or not the whole of the wine was consumed is perfectly immaterial, provided certain effects were produced by it, for it is not the quantity which marks the excess; the effects of intoxication may be produced in some individuals by a much less quantity than would produce any effect whatever in other individuals. It is said that Mr. Speer is a person of weak and sickly constitution; that he is under the necessity of having recourse to a stimulant of some kind or other—in the shape of brandy or wine—to enable him to go through the duties of the entire service, and very probably it may be so, for it is proved by Dr. Roots that he recommended stimulants, and he states that, from the condition of his health generally, it is very probable that a small quantity of wine would produce a greater

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Habitual drunkenness.

Intoxication at church.

Supplied with wine at church.

Quantity drunk immaterial, if certain effects produced.

Defendant's constitution—

requires stimulants.

effect upon him than upon other persons. If that be so, then it is difficult to believe that any of the gentlemen who have been examined in support of the Articles have deposed falsely to their belief that he was in a state of intoxication at the periods to which they refer, and Mr. Bluck, Mr. Speer's curate, and his own witness, states that a very small quantity of wine, even two or three glasses of home-made wine, would give him the appearance of a person in a state of intoxication. If, therefore, Sir C. Sullivan and other parishioners were misled by such a circumstance, and attributed his appearance, like that of a drunken man, to intoxication, though in point of fact he might not have been intoxicated, it obviates the charge of false representation. But when the number of witnesses is considered who, having been in the habit of attending church, morning and evening, for a considerable time, believed he was intoxicated, it is impossible to doubt that they were capable of judging of the effects he exhibited, coupled with the fact that wine was brought into the vestry, and a certain quantity consumed by Mr. Speer. Capt. Williams, an officer in her Majesty's service, has deposed that the defendant, in his presence, has performed the service in an indecent and irreverent manner, and that, on the morning of the 12th August, 1838, there could be no doubt that he was intoxicated. Lord de Ros, who had resided in the parish from 1837 to 1839, and attended the church, speaks to the defendant's having performed the service in an indecent and irreverent manner, so as to cause great offence and scandal, and states that the church was very much deserted on that account. On many occasions he was intoxicated; so much so as to be scarcely able to get through the service. This witness considers the defendant to have been an habitual drunkard during all the time he has been perpetual curate, from having seen him drunk at church, as often drunk as sober. On interrogatory, his lordship states that Mr. Speer is a man of mild and kind manners, and that there is nothing unamiable in him; he has been avoided by the upper classes on account of his conduct; and there is no other reason why, living with his family in the parish, he should not have been received into

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Defendant affected by a very small quantity of wine.

Justifies the evidence.

Defendant as often drunk at church as sober.

JUNE 4. the society of the superior classes. Capt. Lambert, a parishioner, speaks to the defendant's manner of performing the service being indecent and irreverent, and though upon many occasions he could attribute his conduct to intoxication, on one occasion only he can be positive that he was actually intoxicated during the service, in consequence of which, the witness kept his family from the church, and, with Sir C. Sullivan, saw the Bishop of Winchester on the subject. Mr. Tegg, one of the churchwardens, speaks to the same effect. Mersey, the parish clerk for forty-two years, an unwilling witness, admits that there have been often "great failures" in his performance of Divine service; the witness had read the lessons for him. These failures had been always attributed to intoxication; and many persons have been driven away from attending Divine service on account of his manner of performing the service and preaching. On several occasions, the witness has certainly considered that, in consequence of the wine or liquor drunk by the defendant in the vestry, he was in a state of intoxication, and that his failures were in part caused thereby. Mr. Seeley, Sir C. Sullivan, and other witnesses, depose to similar conduct in the church, and one witness states that he was driven away from the church thereby, and went to the Independent Chapel. This shows the effect his conduct must have had upon the minds of the parishioners, and Sir C. Sullivan expressly says, that he would not have continued to attend the church but for the effect which his example might have had upon other parishioners, though he sent his children to a neighbouring church.

Great failures
in performance
of service.

Parishioners
driven from the
church.

Evidence in
support of the
Articles can
leave no doubt
as to general
conduct.

Manner in
which the ge-
neral case met.

This body of evidence can leave no doubt on the mind of the Court as to the general conduct of Mr. Speer during the performance of Divine service, and that it was the effect of wine. How is this general case met? First, by the evidence of Dr. Roots, the medical attendant of Mr. Speer. The remark of Dr. Roots, that a small portion of stimulating fluid might have a greater or more rapid effect upon a person of Mr. Speer's temperament than upon the generality of persons, is strongly confirmatory of the belief of the witnesses, that the appearances he exhibited were the effects of intoxi-

cation: having wine in the vestry, and indulging in some portion of it, what could be more likely than that it did produce those effects? It is very true that the state of his health is the cause of that quantity of liquor having the effect represented; but if so, it was the duty of Mr. Speer to abstain from taking the quantity which was likely to produce that effect. Dr. Roots certainly swears that he does not believe that the state to which Mr. Speer was reduced on these occasions was the result of intoxication; but he states that the effects were such as would probably result from the immoderate use of spirituous liquors, or habits of intoxication, though they are also produced by other causes. But Dr. Roots knows nothing more than that he was occasionally sent for to attend Mr. Speer when labouring under these effects, having had no suspicion that he was addicted to intemperate habits.

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Susceptibility
of defendant a
reason for ab-
staining.

Other witnesses have been produced in support of Mr. Speer's general character, with respect to his performance of his duty, and who speak to their disbelief of the charge against Mr. Speer of being addicted to the immoderate use of spirituous liquors, especially the two Messrs. Dyer, Mrs. Ellis, the widow of the former incumbent, Mr. Dodson, the Rev. Mr. Bluck, and Mr. Doria, a respectable gentleman, who attended the church and visited Mr. Speer, and who never observed that he was addicted to the use of spirituous liquors. But, after all, evidence of this description does not contradict the positive testimony of other witnesses, when the fact is proved beyond all doubt that, upon most Sundays, he was furnished with a bottle of wine in the vestry, and that he drank a portion of it, sufficient to produce the effect which, it is stated, two glasses of home-made wine would produce in Mr. Speer, namely, to make him look silly, and as if he was under the influence of liquor. There appears to have been some very religious people in the parish, whose feelings led them to complain of this gentleman's mode of performing the service, and I cannot doubt that the parties who have instituted these proceedings have been actuated by these motives, and not by those of persecutors.

Respectable
witnesses dis-
believe the
charge.

Negative evi-
dence does not
contradict po-
sitive, support-
ed by facts.

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Specific in-
stances of mis-
conduct.

Non-proof of
5th Article.

Article not
without foun-
dation.

So much, therefore, for the general conduct of this gentleman, in performing his duties; we will now proceed to some instances. The first is one upon which no witness has been produced, and respecting which a great deal of observation has been made as to the conduct of the cause, and the mode in which it has been "concocted," as it is termed in the interrogatory, with reference to the Article which pleads that, on a Sunday morning, in July or August, 1836, Mr. Speer was unable, through intoxication, to finish the service, and notice was given in the church that there would be no sermon. It has been said that this is the main and important Article, which led to the admission of all the others, and but for which the proceedings would have been stopped *in limine* by the rejection of the Articles. I do not understand on what principle that is stated, because there are specific instances pleaded sufficient to have secured the admission of the Articles. It turns out, in fact, that what is pleaded to have taken place in July or August, 1836, did not take place till September, and upon the mistake being discovered, no witness was produced upon this Article. But, according to the case of Mr. Speer himself, the occasion on which no sermon was preached occurred on the 4th September, 1836, when (according to the responsive Allegation) Mr. Speer had been taken seriously ill, and though he attempted to perform the service, he was unable to get through the whole, and was persuaded not to preach. The Article, therefore, was not without some foundation. This 4th September, 1836, is fixed upon as the day upon which Mr. Speer was labouring under indisposition, was carried home from church in a fly, attended by Mr. Seeley, the churchwarden, who, having deposited Mr. Speer at his own house, proceeded to Dr. Roots, and brought him to attend upon Mr. Speer. Now that Dr. Roots did attend Mr. Speer on that day, there can be no doubt; and Dr. Roots states that he found him labouring under one of his usual bilious attacks, and he prescribed for him accordingly, and he states that he had not the remotest suspicion that his illness was caused in any degree by intoxication; but there is no proof that that was the day on which a sermon was not preached; no witness

has been produced to prove that, and Mr. Seeley, who has been interrogated upon this point, says it was on the 11th September; if so, Dr. Roots' evidence goes for nothing, since it applies to the 4th September. It appears, therefore, that there were two occasions when no sermon was preached by Mr. Speer; upon one, the sermon was preached by Dr. Holland, in consequence of Mr. Speer being unwell. Sir C. Sullivan has been examined on the same interrogatory, but he cannot fix the precise date, though he has no doubt (nor Mersey, the clerk) that the omission of the sermon was occasioned by intoxication on the part of Mr. Speer, and Sir Charles admits that the Article was framed from his information, which puts an end to all suspicion that the Article was "concocted," in the invidious sense in which that term has been used, for the purpose of distorting the facts. I have not referred to this evidence for the purpose of founding my judgment, that, at the time when no sermon was preached, Mr. Speer was in a state of intoxication, but only to justify those by whom the Article was pleaded, as to the fact of there being no sermon, though there has been a mistake as to the date.

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Another circumstance pleaded as having taken place in the summer of 1836, is Mr. Speer's falling off his horse through intoxication. The fact of his having fallen off his horse is not denied, but a different version is given to the cause, namely, that, the horse being apt to shy when mounted, it was owing to this cause, and not to intoxication. But both Captain Williams and his butler depose that Mr. Speer was at the time in a state of intoxication; and if they are worthy of credit, the fact is established beyond all doubt, and the contradicting evidence is the most loose that can be conceived, and wholly insufficient. I think, therefore, that the fact is established, that, upon this occasion, the defendant was in a state of intoxication.

But a much more serious charge is contained in the next Article, namely, as to what occurred at the christening of the child in March, 1838, upon which two witnesses have been examined, upon whose credit no imputation is attempted to be affixed; Tegg, who had been churchwarden of the

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parish, and Karn, the father of the child. Both depose that the defendant was drunk upon that occasion. These persons are not contradicted; they are persons of respectability; I cannot suppose they could have been mistaken, and their testimony must have some effect upon the mind of the Court. Merseer, the clerk, does not choose to give information of particular circumstances, and though he is examined on this Article, he will not enter into particulars; he says the occurrence of things of this kind was so frequent, that he is unable to recollect what took place upon any particular occasion. I hold, therefore, that Mr. Speer was at this time in a state of intoxication during the time of performing the offices of the church, and that the expression made use of, after the service was concluded, with respect to his fee, was an indecent exhibition, partly arising, perhaps, from a kindly feeling towards his parishioners, which, if it had stood alone, probably would not have been brought to the notice of the Court; but, connected with the other circumstances, it makes out the charge of indecent conduct in performing the service of the church; for the indecency is not in the words made use of, but in the time and place—that is the sense in which the term “indecent” is used.

Indecent conduct consists not in the words themselves, but in time and place.

The next transaction is stated to have taken place in July, 1836, when, being in a state of intoxication, he read the prayers in an irreverent and unseemly manner. No witness, however, has been examined on this Article (for some reason or other), and it is, therefore, without proof.

The next occurrence pleaded took place on the 12th August, upon the Article pleading which five witnesses have been examined. One of them, Capt. Williams, says it was one of his worst exhibitions; Lord De Ros deposes to the same effect, as well as Sir C. Sullivan and Mr. Seeley; and the reluctant testimony of Merseer shews that Mr. Speer was at that time in a state of intoxication. Whether the quantity of wine he drank in the vestry produced it, or the effect had been more rapid in consequence of some degree of agitation, is not the question, but, Was the effect produced? Was he at this time in such a state as to perform the service in a decent and reverent manner? This, moreover, is not a soli-

tary fact, but is stated as an instance of this gentleman's manner of performing the service.

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I now come to the circumstance which took place on Sunday morning, 10th March, 1839, which led to the communication made to the Bishop, and to the institution of these proceedings. Five witnesses are produced upon this Article, and their evidence is precisely to the same effect as that which relates to the occurrence on the 12th August, 1838: they all depose that Mr. Speer was on that occasion in a state of intoxication. I do not refer particularly to their evidence, because the facts themselves are admitted by Mr. Speer's witnesses, though they attribute his conduct and demeanour on that occasion to indisposition, and not to intoxication. But the Court is satisfied that there were occasions on which Mr. Speer did indulge in the use of wine to a degree inconsistent with the character in which he was to appear before a congregation assembled for Divine worship.

Now what was to be done under these circumstances? Were the parishioners to remain quiet, and take no notice of such occurrences? There seems to have been, as I have stated, a great deal of very proper religious feeling in this parish. Mr. Speer was charitable to, and beloved by, the poor, and yet the higher classes of his parishioners would take no notice of him—it is stated, from unfounded prejudices. What are the unfounded prejudices? It appears to me that Sir C. Sullivan and Mr. Seeley acted most properly in the steps they took. They have been commented upon, as well as their character and behaviour, in terms of severe reprobation; it is, therefore, due to them that the Court should notice the manner in which they have acted; and I cannot but think that Mr. Seeley is perfectly justified in what he has done, supposing the Court has taken a just view of the evidence on both sides. It is not shewn that there is any enmity or malice on his part towards Mr. Speer. I think he endeavoured to abate an evil for the sake of the religious feelings of the parishioners generally and of his own family, he being a person, perhaps, strict in his notions as to religious ordinances and the performance of religious duties, and having ninety persons in his employ, as a printer. Un-

Steps taken
by the parties
making the
charges—

Justified.

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doubtedly, Mr. Seeley has taken an active interest in the manner in which the duty was performed in the parish ; but that is a matter which does not affect his credit, although his testimony might have had a still greater effect with the Court if he had not taken an active part in the promotion of the suit, and if he had not seen the witnesses ; but there is not the least pretence for saying he attempted to influence them to speak to facts which did not fall within their own observation, and were not the unbiassed conclusions of their own minds.

Sir Charles Sullivan is another person supposed to have taken up this matter from religious motives, and to gratify a private resentment against this unfortunate gentleman. Sir Charles has been long resident in the parish ; he is lay impropriator (Mr. Speer's father being the patron of the curacy), and he appears to be a person of religious feelings. Now what part has he taken ? He was a party to the complaint to the Bishop, in which I think he was perfectly justified. He has sworn to his conscientious belief that, upon several occasions, Mr. Speer was in a state of intoxication in the church. What was he to do ? Was he to have his family driven from church, because Mr. Speer conducted himself in this manner ? That the congregation had diminished in point of number is proved. I think Mr. Speer has been ill-advised in insisting upon the statement, up to this moment, that the charges against him originated in spite and malice—that this is all a spiteful and malicious prosecution. There must be some grounds for it, and for what purpose could Sir C. Sullivan have been induced to get up this prosecution, unless there was something behind ? Sir Charles Sullivan has taken no part in these proceedings beyond having joined in the complaint laid before the Bishop, in which he was most fully justified, and there is no appearance of enmity towards Mr. Speer on the part of Sir Charles Sullivan, or Lord De Ros, or either of the other witnesses. If the Court is to form any opinion of the character of Sir Charles Sullivan, it would say that he is a person the least likely to take any share in such a prosecution. His character stands without any suspicion or proba-

Absence of
all proof of ma-
lice or enmity.

bility of such an imputation being well founded, and all the Court can do, with respect to the charges attempted to be brought against him, is to say, that he is free from all suspicion of improper motives, or of being influenced by malice or resentment towards this individual.

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Burdett. Speer.

Upon the whole of the case, I am clearly of opinion that the evidence is sufficient to establish the charges made against Mr. Speer; that if he is not proved to have been, in the strict sense of the term, an habitual drunkard, he is proved to have been frequently guilty of the crime of drunkenness, and it is not necessary that every Article should be proved to its full extent; it is quite sufficient if the ecclesiastical offence is made out distinctly by the evidence taken upon the Articles. I am also clearly of opinion, that Mr. Speer is fully proved to have been rendered incapable, from the effect of liquor, of performing the duty of the parish church in a proper and seemly manner, and further, that he has gone the length of performing it in an indecent and irreverent manner, and that the natural consequence has been the withdrawal of several of the parishioners from attendance at their parish church; and I think if some steps had not been taken to check his proceedings, they must have led to its entire desertion. It is, therefore, due to the attendants at the church, that the Court should pronounce a sentence that shall have the effect of preventing the recurrence of these improper proceedings and exhibitions, and give this gentleman an opportunity to amend his conduct.

Articles sufficiently proved.

Not necessary every Article should be fully proved.

Before I proceed to pronounce that sentence, I will notice certain interrogatories (upon which the Court has been called upon to pronounce its opinion) administered to some of the witnesses examined upon the Articles. The object with which I refer to these interrogatories is to point out the impropriety of imputing to witnesses of highly respectable character the charges to which I have adverted, namely, of acting from malice and private revenge, and of entering into a conspiracy against this gentleman, and attempting to support such proceeding by evidence which is false: in fact, of having brought forward these unfounded accusations to as-

Objectionable interrogatories to witnesses.

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Bardery Speer.

perse his character. Now, I repeat, that a more improbable case of conspiracy can hardly be imagined. I am not prepared to say, that it is not open to a party, if he choose, to impute malice, and resentment, and spite to individuals by whom he suggests that he is persecuted—I have great difficulty in saying that the Court ought to prescribe any rule by which Counsel should be governed in settling interrogatories, upon such suggestions from their clients, fortified by their strong asseverations of innocence; I feel great difficulty in saying what is the course which should be pursued, as the Court cannot know what the individual circumstances of the case may be, and it must, I am afraid, be

Settling of
interrogatories
must be left to
the discretion
of Counsel.

left, in each case, to the discretion of Counsel—that discretion which they are bound to exercise for the advantage of their client, as well as with respect to the general interests of society. I must leave it to the good taste and discretion of Counsel in what cases they will be justified in imputing to witnesses improper motives towards individuals.

Court has
not means of
stopping Counsel
in administering
interrogatories.

This Court has not the means of stopping Counsel in administering interrogatories, as in a court of law, where questions are put *viva voce*, and where probable proof of a conspiracy, if it exist, may be obtained at the moment. I can only say, that I disapprove of the nature of the interrogatories in this case, because I see that they are without a shadow of foundation in fact. What can I say, but that Counsel should not lend themselves to attacks upon witnesses, by means of interrogatories which impute improper motives to them, of which there is no proof? I can only express my disapprobation of such interrogatories when they are brought to my notice, and from the facts before me, I have seen in this case, with great regret, that, from assurances given to Counsel of innocence of the charges imputed to their client—for they must have been grounded upon those unfounded assurances, and upon statements that there were grounds for imputing the charges to spite and malice—the Counsel have been induced to sign these interrogatories. I cannot lay down any rule; I can only express my hope that Counsel will govern themselves by what they consider right, for I can assure Counsel on both sides, that

Court disapproves of the
interrogatories
in this case,
because unfounded.

they can produce no other effect upon my mind than a prejudice against the person by whom these interrogatories are administered, provided they do not shew that the persons to whom they are addressed have been actuated by improper motives. Whenever a case is made to depend upon charges of conspiracy, perjury, and subornation of perjury, against a number of individuals, whether in high or low life, it always creates a suspicion in the mind of the Court, that that case has no substance or foundation. I can say no more upon this subject, than to express a hope that Counsel will abstain, as far as they possibly can, from putting interrogatories which in substance or language they may consider as conveying imputations upon individuals, in whatever situation those individuals may be.

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When a case depends upon a charge of conspiracy against a number of persons, it creates a suspicion that it is unfounded.

With respect to the sentence, I have endeavoured to find, if possible, any circumstances which might justify the Court in passing one less severe than that which it has been accustomed to pass in cases of this description. I have considered whether there is any thing from which the Court can suppose that this gentleman has shown any symptoms of contrition; but, unfortunately, I am bound to say that the circumstances shew no ground of mitigation. From beginning to end, he has denied the charges; and it is suggested that they are founded in malice, and therefore there is nothing of which he has to repent; as no fault has been committed by him, there is nothing for which he is to express contrition. I am bound, therefore, to pronounce that sentence which the Court has been in the habit of doing in cases of this kind,—such a sentence as will give the party opportunity of amendment,—namely, suspension for three years. The party will therefore be suspended officially and beneficially for three years, and, as is the usual course, until he produces a certificate, from three beneficed clergymen, that he has been of good conduct during that time; and, as a necessary consequence, I am under the necessity of condemning him in the costs incurred in these proceedings.

The sentence.

No ground of mitigation.

Suspension *ob officio et a beneficio* for three years.

Certificate.

Costs.

High Court of Admiralty.

JUNE 8.

Conflicting claims of two Queen's ships to the bounty due on the condemnation of a slave-vessel. — Jurisdiction of this Court.

THE "EAGLE."—*Cause.*—This was a question between two of Her Majesty's ships, employed on the African coast in the suppression of the slave-trade, claiming the bounty due on the condemnation of a vessel, named the *Eagle*, by the Mixed Commission Court at Sierra Leone, the vessel herself having been lost previous to the proceedings there. The claim lay between H.M.'s sloop *Lily*, of 16 guns, Commander Reeves, which originally took possession of the vessel, and H.M.'s brigantine *Buzzard*, of 8 guns, commanded by Lieut. Charles Fitzgerald, which effected a second seizure, under the circumstances detailed in the judgment of the Court.

May 26.
ARGUMENT.

Decision of the Mixed Commission Court final.

Jurisdiction of the Court under the stat.

PER CUR.

Sir John Dodson, Q. A., for the *Buzzard*. This is a proceeding calling upon us to shew cause why the bounty-money, which has been paid by decree of the Mixed Commission Court to the agent of the *Buzzard*, should not be paid over to the *Lily*. I see no ground in law or fact why it should be paid over. The decision of the Mixed Commission Court at Sierra Leone is final and conclusive, and it is not competent to this Court, under the stat. 5 Geo. 4, c. 113, which embodied the treaties with foreign powers, and enacts that the Mixed Commission Courts shall adjudge definitively, to entertain appeals from their decision. In the "*Donna Barbara*,"* the Court of Admiralty held that a bounty decreed by the same Mixed Commission Court was not payable, but upon appeal to the High Court of Delegates, this sentence was reversed, and the decree of the Mixed Commission Court was held to be final. The jurisdiction given to the Court by the Act (§71) does not empower it to reverse or vary a decree of a Mixed Commission Court, but only to adjudicate between parties who may have a claim to bounty, or upon the proceeds of the vessel, and to see justice done; it has no power to take the bounty away from parties to whom the Mixed Commission Court has decided that it belongs. [PER CUR. Could I decide between joint captors?]

* 2 Hagg. A. R. 366.

Yes, because the Act has provided for it; this Court is authorized to enforce, but not to alter, a sentence of the Mixed Commission Court. If the Court has not power under the statute, it has none at all; and yet the Court is asked to say that the vessel was not captured by the *Buzzard*, but by the *Lily*. The facts, moreover, shew that the *Buzzard* was the real captor.

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Addams, D., contra. The Queen's Advocate has construed the treaties, the statute, and the case of the "*Donna Barbara*," erroneously. The Mixed Commission Courts have jurisdiction to decide without appeal in questions of prize between two countries; but it was never intended that this Court, in considering questions of bounty, might not vary the sentence of the Mixed Commission Courts, without interfering between two countries. The "*Donna Barbara*" was not a question as to the distribution of the bounty between parties in this country, but whether any bounty was due at all; and the Court of Delegates was of opinion that the decree of the Mixed Commission Court, being a judgment *in rem*, was good against all the world. Here it is immaterial to the country which the *Eagle* belonged to, whether the bounty is awarded to one vessel or the other. The *Lily*, which seized the vessel, in the first instance, is entitled to the bounty.

Final decision of Mixed Commission Courts confined to questions of prize between two countries.

The true question in the "*Donna Barbara*."

DR. LUSHINGTON.—I think it expedient, first, to look at the facts of the case, as they are stated in the evidence of Lieut. Boys; to consider to what conclusions I am to come upon that evidence; and then to see whether the Act of Parliament, or the treaties, would bind me to any particular determination.

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JUDGMENT.

Mr. Boys' statement is to this effect: That he was originally a mate on board the *Lily*; that, on the 1st of January, 1839, when off Lagos, a noted slave port on the African coast, Lieut. Fitzgerald, in command of the *Buzzard*, sent a boat, under Mr. Aldridge, his senior mate, to board the *Eagle*, then lying off Lagos, with American colours flying; that Mr. Aldridge boarded that vessel; that he then made a report to Lieut. Fitzgerald, Mr. Boys being at that time on board the *Buzzard*, serving as mate. Under the circum-

The facts.

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stances, Lieut. Fitzgerald declined to seize the vessel ; and some time afterwards, Mr. Boys joined the *Lily*, and a communication was made by him, of what had occurred with respect to the *Eagle*, to the commander, Captain Reeves, who seems to have come to the conclusion that there was just ground for making the seizure, and accordingly took possession of the *Eagle* : the words used by this witness are to the extent that it was his representation which effected the second seizure. He proceeded in charge of this vessel to Sierra Leone, and there a communication took place between him and Mr. Dougan, a gentleman who seems to act on behalf of seizers at that settlement. Some communication was made to two of the judges of the Mixed Commission Court, and it was in some way or other—for it is not specifically stated how—determined that the Court ought not to take cognizance of the case, and the consequence was, that Mr. Boys found himself with the vessel on his hands at Sierra Leone. Having remained there about a week, and having received no orders from Captain Reeves as to what steps he should take in the contingency of such a circumstance occurring—for it is clear that Captain Reeves never foretold or foresaw in any degree that such a state of things would take place—he proceeded in search of the *Lily*, in about a week after his first arrival at Sierra Leone. The *Lily*, however, had quitted that station, and had proceeded home. He states that he fell in with her Majesty's ship the *Buzzard*, and reported to Lieut. Fitzgerald, commanding her, the seizure of the vessel, and the refusal of the judges of the Court at Sierra Leone to take any cognizance of the case, by reason that she was captured under American colours.

Evidence.

This is a general statement of the facts ; but it may, perhaps, be expedient to look at some of the observations made by the witness, in order more particularly to ascertain what were the reasons which induced Lieut. Fitzgerald to make the seizure. He says, "I made a communication to Lieut. Fitzgerald, in regard to the peculiar situation I was placed in ; and, in consequence of what I said to him, he seized the *Eagle* as on behalf of the *Buzzard*, and under a new

and altered declaration, hauling down the American flag and hoisting a Spanish flag in the *Eagle*. He removed me and my prize crew out of her, and placed a mate and prize crew from the *Buzzard* (his own ship) on board of her in our stead." Upon cross-examination, he says, "The *Eagle*, under the American flag, did on that day (12th of March, 1839) run into Clarence Cove, and within gunshot of the *Buzzard*; and Litty, the master, had up to that time persevered in asserting that the vessel was American property. I did report myself to Lieut. Fitzgerald, commanding the *Buzzard*, in due course of service, as to my superior officer. I did acquaint him of my failure in attempting to procure the condemnation of the *Eagle* at Sierra Leone, and the reason of such failure, namely, the ostensible American ownership and flag of the said vessel. It was my intention, on finding a British cruiser in Clarence Cove, to abandon the *Eagle* there, and apply to be received, with my crew, as supernumeraries, on board such cruiser." "I did, with my crew, not voluntarily, but acting under the orders of Lieut. Fitzgerald, but which orders I was glad to receive, quit the *Eagle* in Clarence Cove; and we were—not at our own request, but by order of Lieut. Fitzgerald (that I am convinced of)—received as supernumeraries on board the *Buzzard*." "Lieut. Fitzgerald himself went on board the *Eagle* in Clarence Cove. He did very closely interrogate Litty in respect of the national character and ownership of the *Eagle*. Litty did, in consequence of such interrogation, and of being told by Lieut. Fitzgerald that he would be probably taken to America, then, for the first time, confess that the vessel *Eagle* and her cargo were the property of Spaniards residing at Havanna, and that he (Litty) had been engaged as a nominal master, for the sake of his hoisting an American flag. Litty was very reluctant to make such a declaration. He had been questioned, not so long as for three hours, but for as long as for one full hour, before the said fact was elicited." "Litty did, after declaring the said vessel and cargo to be Spanish property, hoist a Spanish ensign on board the *Eagle*. He did that voluntarily. Lieut. Fitzgerald did not take possession of the *Eagle* previous to

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the Spanish ensign being displayed thereon. He took possession of her as being Spanish property. It was after the Spanish ensign was hoisted that Lieut. Fitzgerald sent an officer and the prize crew from the *Buzzard* on board the *Eagle*."

The vessel, having been so taken possession of, was carried to the United States of America; an inquiry took place, and she was finally taken back towards Sierra Leone, but on her way thither, met with an accident and was lost. Proceedings, however, were instituted in the Mixed Commission Court at Sierra Leone, for the condemnation of that which, in fact, had no existence, as I apprehend, for the purpose of securing the payment of bounty.

Questions arising from the facts.

Now, looking at all these facts, the first important point, in my opinion, is, in what situation was Mr. Boys at the time when he met with the *Buzzard* in Clarence Cove? He at that time was in command of the *Eagle*, under the authority of Commander Reeves; and the question is, first (though not solely), whether it was competent to Lieut. Fitzgerald to remove him, and immediately afterwards make a seizure for his own benefit. That he was removed by the authority of Lieut. Fitzgerald, there can be no doubt whatever, upon the evidence, for he himself expressly so states. Now, I never recollect, in the course of all my experience in these Courts, any attempt having been made by an officer commanding one of her Majesty's cruisers to take possession of a vessel already in the custody of an officer belonging to another, for the purpose of proceeding against that vessel upon a second seizure. I apprehend that it would be an exceedingly dangerous principle to establish, that a vessel being—as the *Eagle* must be taken to be, for the purposes of the present inquiry—in the custody of an officer belonging to one vessel, he should, by the authority of any superior officer whatever, not merely be dispossessed of that vessel, for the purpose of allowing her to go free, but that she may be again seized, the benefit to inure to the second seizer. I should not have had any hesitation in saying, it was not competent to Lieut. Fitzgerald to do the act he did; and that whatever he might have done, with respect to bring-

Re-seizure by the *Buzzard* unauthorized.

ing this vessel to final adjudication, must have inured to the benefit of the original seizer. But it is right to consider whether any thing intervened between the period of his ordering Mr. Boys to quit the *Eagle* and to come on board his vessel, the *Buzzard*, and the time of the second seizure, which ought to make a different impression on the mind and judgment of the Court.

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What did Lieut. Fitzgerald do? I am now putting the case in the most favourable point of view to him, for I am assuming that Mr. Boys was actually removed before the conversation which took place between Lieut. Fitzgerald and the master of the *Eagle*—I am assuming that. Lieut. Fitzgerald goes on board the vessel—he interrogates the master during a considerable period, at least an hour, according to the evidence. He tells him that he shall carry him to the United States, which operated as a threat; and then the master for the first time declares that the vessel is in reality Spanish, and not American. This being so, the master then hoists the Spanish flag instead of the American. Now, do these facts constitute any difference which ought to induce me to depart from the principles which I think would be ordinarily applicable to such second seizure? I am of opinion that they do not; because in reality the character of the vessel was not in the slightest degree altered by any thing that was said or done. The mere fact of the American flag having been hoisted one moment, and the Spanish flag the next, could not affect the national character of the vessel; and it does appear to me—and I am glad to take this opportunity of noticing it—that it never can be considered, in these slave seizures, that the carrying of a flag only shall indelibly fix upon vessels a national character; because, if that were so, there is an end to all the treaties which Great Britain has made with Portugal, Spain, and other countries; for what would be so easy as always to carry an American flag on board, and when the vessel was in the slightest danger of being captured, to hoist that flag? If that is to shut out all inquiry, I apprehend it is utterly useless to have any British cruisers stationed on the coast of Africa at all. Then, in point of fact, there was no alteration in the character of the vessel.

Circumstances
unaltered.

Flag does not
fix the national-
ity of the ves-
sel.

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tion of the circumstances whatever, because the facts were such as they originally were at the time of the first seizure, and the circumstance of hoisting the Spanish ensign could by no possibility affect the merits of the case. Whether Lieut. Fitzgerald, in seizing this vessel, acted prudently or not, perhaps is not a matter for the consideration of the Court. The only question I have to decide is, to whom the bounty is due by law; and before I give my opinion on that subject, I will notice the arguments founded upon the treaties and upon the Act of Parliament.

Jurisdiction
of this Court
derived from
statute.

Now, all the jurisdiction which I possess upon this question, or which the Court of Admiralty could exercise, is derived from the Act of Parliament, and that Act says: "That any party or parties claiming any benefit by the way of bounty or share of the proceeds of the seizure of any Spanish, Portuguese, or Netherland vessels, for violation of a treaty or convention, shall and may resort to the High Court of Admiralty for the purpose of obtaining the judgment of the said Court in that behalf." Now, certainly, this being a claim entirely confined to bounty, it does appear that the words of this statute confer upon the Court very ample jurisdiction to determine who is entitled to any benefit by way of bounty in a case of this description. But it goes on further to say, "That it shall be lawful for the judge of the High Court of Admiralty not only to determine thereon, but also to hear and determine any question of joint capture which may arise from any seizure of slaves." Now, it is said that, notwithstanding that section, the words of the treaties (of 1817 and of 1835) are so strong, that, condemnation having passed to the *Buzzard*, this Court is precluded from considering the facts of the case, and must, of necessity, proceed as if that adjudication was, to all intents and purposes, not only final, but not examinable by this Court; and in support of that argument, the case of the "*Donna Barbara*," and the final adjudication of that case by the Court

To determine
who entitled to
bounty.

Object of
treaties limited
to questions
between sub-
jects of two
states.

of Delegates, was cited. In looking at the treaties, it is quite obvious that the only object that these treaties can have in view is, to determine upon the rights of the subjects of the two states, when put in competition. It would not

only be wholly unnecessary, but it would be inconsistent with all the sound principles of government, to insert in a treaty that which should be intended solely to affect the interests of the subjects of one of the contracting parties, without reference to the subjects of the other; and it is a matter of home legislation as to who is entitled to the bounty—not a matter to be contracted for between two nations. The object of the treaty was this: to state under what circumstances a vessel should be taken, which had committed a breach of the treaty, and thereby become liable to condemnation; not to go further, and pronounce that the judgment of the tribunal constituted by this treaty should be examinable by no other. The words of the second treaty are stronger than those in the first; and if the words in the second would not include the point, *à fortiori*, the words in the first could not: “The Mixed Courts are to decide upon the legality of the detention of such vessels as the cruisers of either nation shall, in pursuance of the said treaty, detain. These Courts shall adjudge definitively, and without appeal, all questions which shall arise out of the capture and detention of such vessels.” What is the meaning of these words? I apprehend it to be quite obvious that they include nothing whatever, save questions arising between the subjects of the two contracting parties. It is quite obvious, upon consideration, that this must be the case; because the Spanish Government has nothing to do with our giving bounties to vessels that may effect captures; they have no concern with the distribution of the bounty; it does not matter to them upon what principles the bounties are given, or by what rules they are distributed. I consider, therefore, that the effect of the treaty is this—that where it has been decided that a vessel has been rightly condemned, all inquiry is immediately shut out; where it has been resolved that the vessel is not liable to condemnation, whatever circumstances might afterwards be developed, it would be impossible to enter into any further investigation—and that is the extent of the treaty.

But it was stated that, in the “*Donna Barbara*,” a different view of this question was taken by the High Court of

JUNE 8.

The Eagle.

Terms of the treaties.

Their effect.

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Case of the
"Donna Bar-
bara" related
to a matter
within the trea-
ties.

Delegates. What were the grounds of their judgment—at least, what were the observations made by any of the judges. I have no knowledge whatsoever, or upon what principles they proceeded. But I think it is easy to perceive that the ground which they must have taken does not interfere with the judgment that I am about to pronounce in this case. In the "*Donna Barbara*," the question was, whether any bounty was due or not—whether the vessel that had effected the capture was entitled to effect it—that was the case of the "*Donna Barbara*." Now, this is a matter within the treaty, because the treaty specifically provides for this point. It provides that search and capture shall be made only by vessels particularly circumstanced; and it is a fit matter for investigation by the Mixed Commission Court, whether the capture has been effected by a vessel entitled to make it or not. I apprehend that, if the Mixed Commission Court discovered that a vessel brought in for adjudication had been captured, and then proceeded against by a person unauthorized by the treaty so to do, it would have a perfect right to reject those proceedings for condemnation. The "*Donna Barbara*," therefore, was a case fairly within the cognizance of the Mixed Commission Court; and that being the case, the Court of Delegates might, with great propriety, come to the conclusion that it was not a matter again to be made the subject of discussion, and to undergo revision by the Courts of this country. I do not feel, therefore, that the case of the "*Donna Barbara*" in any degree presses upon me in coming to a conclusion contrary to that at which the facts of the case and all the reasonings upon it at first induced me to arrive.

Questions of
joint capture.

But when I look at the Act of Parliament, I am more than ever satisfied that it is the duty of the Court not to consider this matter as settled by the decision of the Mixed Commission Court; but that it is my peculiar duty to examine and inquire who is the real captor of this vessel. How am I to decide a question of joint capture, if the decision of the Mixed Commission Court is to be considered as final? A vessel trading in slaves is seized by one of the cruisers in sight of another. The vessel effecting the capture immediately carries the slaver to Sierra Leone, and she is con-

demned to the party who proceeds, and if I were to be estopped by the decree of the Mixed Commission Court, I never could consider the question of joint capture at all. Not only so, but it would be competent to proceed in the names of two vessels, one of which had no title to share, and a third vessel would not be at liberty to contest the real merits of the case, because of the decision of the Mixed Commission Court. In short, if the decision of the Mixed Commission Court were binding on this Court, in all questions of joint capture, the effect would be to take away its jurisdiction, and to leave it no power of doing justice between British subjects, with which the Mixed Commission Court has nothing to do.

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I am of opinion that this capture must, in point of law, be considered as a capture by the original seizer; that it was not competent to Lieut. Fitzgerald to remove the officer in charge of the prize, for the purpose of making a prize of her himself; and that, having so removed him without competent authority, every thing that was afterwards done, must of necessity, in law, be considered as the act of the original seizer, who was not legally deprived of his authority over the vessel. Therefore, I must pronounce for the claim of Commander Reeves, and the *Lily*, which he commanded. Claim of *Lily* pronounced for.

(The Court gave the costs incurred in procuring the condemnation at Sierra Leone.) Costs.

Prerogative Court of Canterbury.

JUNE 9.

IN THE GOODS OF JANE SOTHERON, WIDOW, DEC.—
Motion.—The deceased died 4th April last, leaving a will (executed conformably to the statute) dated 10th February preceding, disposing of her property, to the amount of £6,000. In the will occurs the following clause: “And I also wish that my executors shall observe the instructions I have left respecting my jewels, trinkets, &c. &c. &c.” T. R., one of the attesting witnesses, deposed that, on the 11th February, the day on which the deceased actually executed

Instructions to executors, unattested, referred to in a will of posterior date, not pronounced for as part of the will.

JUNE 9. her will (in his presence and that of W. G. T.), prior to the execution, she, being alone with him, produced a paper, all in her own hand-writing and subscription, dated 12th December, 1839, and informed him it was the same paper referred to in her will; whereupon she, at the deponent's suggestion and in his presence, wrote as follows: "These are the instructions referred to in my will as having been left respecting my jewels, trinkets, &c." and thereto subscribed her name, "J. Sotheron, Feb. 11, 1841;" but the paper was not on such occasion produced by the deceased to his fellow-witness.

Sotheron, dec.

Testatrix produced the paper;

and described it as the instructions.

ARGUMENT.

Curteis, D., in support of the motion for probate of the paper of instructions with the will, as incorporated therewith, argued that the reference in the will was sufficient to shew that they were the same instructions, and there were no other.

JUDGMENT.

SIR H. JENNER.—The Act requires that a will or codicil shall be signed at the foot of the paper by the testator, in the presence of two witnesses present at the same time, who shall attest the same in the presence of the testator. I am not aware of any case in which the Court has gone the length of holding, that a paper referred to in a will shall form part of the will. Where there has been a codicil, executed as a codicil before the date when the statute came into operation, the Court has held its republication sufficient in the presence of witnesses, when referred to in a document of subsequent date.* But here the paper is dated in December, 1839, consequently after the Act came into operation, and it is not signed in the presence of witnesses. I cannot see how the Court can say that this is a part of the will, and decree probate of it. It is not executed in the presence of witnesses; it is produced to one of the subscribed witnesses to the will, but it is not produced to any other witness, and he does not attest it. I must reject the motion. I am sorry for it, as it defeats the intention of the testatrix.

Not executed in presence of witnesses.

Motion rejected.

* *In the Goods of John F. Smith*; ante, p. 2.

High Court of Admiralty.

JUNE 17.

THE "ARMADILLO."—*Act on Petition.*—The vessel, in this case, a brig of 400 tons, owned by an American, left New York, 4th October, 1840, for Antwerp, there discharged her cargo, and proceeded in ballast to Newcastle, where she arrived on the 2nd November. The master (Benedict) addressed himself to Mr. C. F. Jackson, and produced to him a letter of credit from his owners, Eastman and Co., and a recommendation from a house at Antwerp. Mr. Jackson procured a cargo (valued at £3,000), including 200 tons of coals, not on freight, but on account of the ship, and made advances to the amount of £210, for which he took bills drawn by the master on Eastman and Co., which were afterwards returned dishonoured. The vessel, meanwhile, sailed from Newcastle, but struck on the bar, received damage, and returned on the 28th November. The master applied to Mr. Jackson for a further advance of money, for the necessary repairs and supplies; but his suspicions having been excited, as to the ownership of the vessel, he thought it expedient to inspect the register, which (he represents) had been sedulously concealed from him. He applied to the American Vice-Consul (with whom the register was deposited), and upon inspection found that a bottomry-bond (endorsed on the register, conformably to the American law) had been executed at Antwerp, and that Eastman and Co. were not the owners of the vessel, which belonged to a Mr. Campbell. On the 16th December, the master renewed his application, but Mr. Jackson refused to make any advances except on condition that the master should execute an assignment of the freight of the voyage, to cover the amount already advanced and secured by bills (which had not yet been returned), and execute a bottomry-bond for the advances about to be made. These conditions were agreed to; advances were made by Jackson, and on the 12th January, 1841, a bond was executed for £384, the amount of these advances, with 25 per cent. interest.

Bottomry.—Money advanced for a foreign ship, on bills upon the owner, afterwards covered by an assignment of freight, not recoverable under sec. 6 of stat. 3 & 4 Vict. c. 65. — Attempt to recover on a bottomry bond, on the ground of fraud or misrepresentation, and on account of a deviation in the voyage, not sustained.

JUNE 17. The vessel sailed from Newcastle on the 22nd January, bound for New York. Upon arriving off Deal, the master remained in the Downs for seven or eight days, and then proceeded to Cowes, where he arrived on the 2nd February; the vessel was surveyed next day, and found to be leaky. Mr. Jackson, learning from a newspaper that the vessel had gone to Cowes, proceeded thither, and, on his arrival found that the cargo had been unladen, and that the master was selling the coals. He immediately obtained an injunction from the Vice-Chancellor to restrain the sale. On the 23rd February, the vessel, being empty, fell over, and sustained damage. Meanwhile, negotiations had been going on between the master and Mr. Jackson for further advances on bottomry, which were refused, and finally the injunctions (for there were several) were dissolved, with costs. On the 3rd March, the master was arrested at the suit of Mr. Jackson; on the 9th, the vessel was surveyed; the next day, docked; but no repairs were done; and, being about to prosecute her voyage, was, on the 13th, arrested by process of this Court at the suit of Mr. Jackson.

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ARGUMENT.

The lender within the equitable meaning of the stat.

Bond due, through fraud, delay, and deviation.

Nicholl, D., for the bondholder. Under the statute, 3 & 4 Vict. c. 65, a person supplying a foreign ship with necessaries, may arrest her, and prosecute his claim in this Court, a practice consonant with the universal maritime law, though not heretofore the law of England. Mr. Jackson is clearly within the equitable meaning of the statute, for he is in the situation of a person supplying necessaries to the master for the service of the vessel; he not only lent money, by which necessaries were supplied, but was responsible for supplies in the same manner as a sail-maker, purchasing ropes, supplies the ropes. This Court is invested with a large equitable jurisdiction, and seeing that Mr. Jackson is likely to lose money if that jurisdiction be not exercised, it is the duty of the Court, under the statute, to hold that, having pledged his credit on account of the vessel, he comes within the equitable construction of the 6th section of the statute. But, if the Court thinks it has no jurisdiction under the statute, he is entitled to recover on the bond, the money having been obtained fraudulently and by undue re-

presentation, and it has become due through a deviation from the course of the voyage. Eastman & Co. had been held out to Mr. Jackson as the owners of the vessel, whereas there is no proof that Eastman & Co. ever were owners. The delay of the vessel in the Downs is suspicious. If it was really leaky, the master should have gone to the nearest port. This is the duty of a master in such cases, according to Lord Hardwicke, in *Motteux v. The London Assurance Company*.* Why did he not go to Ramsgate or Dover? These ports were within the limits of the voyage, whereas we deny Cowes to be so; and he gave no notice to any person interested in the cargo. Whilst at Cowes, the vessel was neglected, as well as the cargo, some parts of which were perishable; and the master then proceeded to sell the coals, on which Mr. Jackson had a *lien*. The survey which the vessel underwent was an insufficient one; we say that she was totally unseaworthy and her timbers were rotten. JUNE 17.
The Armadillo.

What amounts to a vitiation of a policy of insurance makes a bottomry-bond liable to be sued upon. The deviation, in going to Cowes, was wilful. In such cases the bond is forfeited, and may be recovered, though the vessel did not proceed on her voyage. The Court will, therefore, relieve Mr. Jackson either under the statute, or by pronouncing that the bond is due; with land interest, or maritime interest; *pro rata itineris peracti*, or for the whole voyage. Vessel unseaworthy.
What vitiates a policy of insurance, renders a bond due.

[Authorities cited: *Park, Ins.*;† *Marshall, Ins.*;‡ *Williams v. Stedman*;§ *Western v. Wilkey*;|| *Fox v. Black*;¶ *Townson v. Guion*;** *Elliot v. Wilson*;†† *Mount v. Larkins*;‡‡ *Inglis v. Vaux*;§§ *Williams v. Shee*;||| *The "Jacob"*;¶¶ *The "Neptune,"* 1802; *The "Waksamheid,"* 1809.] Authorities.

Harding, D., on the same side.

Addams, D., for the owner. This is not a case within the spirit and meaning of the statute, nor is Mr. Jackson entitled to invoke the equitable jurisdiction of the Court. If he has Case not within meaning of stat.

* 1 Atk. 545.

† 2 Vol. c. 17.

‡ 2 Vol. c. 12.

§ Holt, 126.

|| Skin, 152.

¶ 2 Park, *Ins.* 438.

** *Ibid.*

†† 7 Bro. P.C. 459.

‡‡ 8 Bing. 108.

§§ 3 Camp. 437.

||| *Id.* 460.

¶¶ 4 Rob. 245.

JUNE 17. been a sufferer, it is by his own fault. What object could the master have in misrepresenting the ownership of the vessel? There had been a conditional transfer from Campbell to Eastman & Co., which was not completed, though the master believed Eastman & Co. to be the owners. Before the bond was given, Jackson knew all the circumstances. The sale of the coals at Cowes was unavoidable, and it was a good market for the article. The coals were not on freight; Jackson had no *lien* on them. The injunction obtained by him was a most unrighteous proceeding; he arrests the master and compels him to pay the proceeds of the coals. The shippers then obtain injunctions, which are dissolved with costs. After all this, Jackson now asks for his bond, on the ground of deviation and delay. The delay was solely owing to Jackson, for if he had not interfered to prevent the sale of the coals, the vessel would have proceeded on her voyage, and the bond might have been enforced at New York. As to the deviation, the voyage described in the bond is from Newcastle to New York, "with permission to the master to touch and stay at and proceed to, at his discretion, all ports and places within the limits of the voyage." Cowes is in the line of the voyage to America. Mr. Jackson has no right to proceed under the statute, and all the obstacles which prevented the completion of the voyage resulted from his conduct, in endeavouring to advance his own interests.

Conduct of lender unrighteous, Delay owing to him, No deviation, Completion of voyage prevented by conduct of lender.

Robinson, D., on the same side.

JUNE 17. JUDGMENT. Dr. LUSHINGTON.—When application was made to this Court to arrest the vessel, I was anxious to understand upon what principle a warrant could be looked for. Upon reference to an affidavit, dated the 10th March, 1841, it appeared that there might possibly be grounds upon which the arrest could be maintained. One was, that necessaries had been supplied to this vessel, which was a foreign vessel; another was, that a bottomry-bond had been given, which had become due. The case appears now to have resolved itself into these two points—namely, that the bottomry-bond is due in consequence of the master never having *bonâ fide* intended to proceed to the alleged port of destination, New

Grounds upon which warrant issued.

York ; an unnecessary delay in the prosecution of the voyage ; and also, a deviation from the proper course. It might have been that the bond was given with a fraudulent intention to defeat the claim of Mr. Jackson ; or it might be that the bond, having been *bonâ fide* executed, subsequently became due. I think there is no ground for the Court to proceed under the statute, which gives it jurisdiction against a vessel for obtaining payment to those who have furnished necessities to a foreign ship, because there does not appear to me to be any circumstances disclosed which shew that there was originally a fraudulent intention : but I purpose to advert to some of these circumstances, and see how far they are capable of explanation.

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No ground
of proceeding
under the stat.

The circumstances which occurred at Newcastle are alleged to be connected with fraudulent purposes ; but I find it difficult to come to such conclusion. I do not see how Mr. Jackson suffered any damage from the representations with respect to Eastman & Co. being the owners of the vessel, even supposing that they were not the real owners. With respect to the discovery of the former bond, though it is stated in the affidavit that the ship's papers were "sedulously kept back" from Mr. Jackson, yet he does not state that he made any attempt to inspect those papers ; nor can I understand what greater difficulty there was in his inspecting the papers in November, 1840, than he experienced in inspecting them in December. However this might be, it is clear that these facts can only affect the £200 originally advanced. With all those facts, as he states, then perfectly known, he proceeds again to intermeddle with the transactions of the vessel, and he voluntarily, with a full knowledge of all the previous circumstances, enters into the transaction which ends in the bottomry-bond. When the vessel sailed from Newcastle, I am at a loss to conjecture upon what ground it can be argued that the master never *bonâ fide* intended to proceed to New York, his place of destination. If he had no such intention, and if his conduct, after quitting Newcastle, is tainted with fraud, and he never intended to complete the voyage, I have no hesitation in saying that the bond is due. The general principle, where a bottomry-bond

Circumstances
under which
bond given, not
fraudulent.

All facts
known to lender.

JUNE 17. is given by a master, is, that the bond does not become payable till the voyage has been completed; but if a master, setting out on a voyage, fraudulently determines not to proceed with the vessel to the place to which she was destined, I entertain no doubt whatever but that the bond becomes due.

The Armadillo.

General principle regulating payment of bonds.

Detention of vessel,

The detention of the vessel in the Downs, for seven or eight days, is a circumstance which has been much relied upon, as shewing that the master was guilty of a delay totally unjustifiable; and it has been argued that any delay would vitiate the bond, or, in other words, would cause the bond to become due, and its payment liable to be enforced by this Court. But the facts do not enable me to come to the conclusion that the master was guilty of any delay not justified by the circumstances. Whatever was the condition of the vessel, whether, when she left Newcastle, she was, as represented by some witnesses, in so rotten a condition that it would be impossible effectually to repair her; or whether the repairs done at Newcastle were done so incompletely as not to render her perfectly seaworthy; still I think it is clear, from all the affidavits as to the surveys and examinations of this vessel, that she was in a leaky state when she reached the Downs; and considering that she was about to cross the Atlantic, I can see nothing in the nature of fraud or unjust delay in the master remaining in the Downs for the purpose of ascertaining whether the leak was of such a character as to endanger the ship and the lives of those on board, if she prosecuted her voyage without further repairs.

delay at Cowes, and alleged deviation,

It is alleged that the proceeding to Cowes was a deviation from the proper track; and in the course of the argument it was very much insisted upon that it had been stated in the Act on Petition, that the port of Cowes was not within the limits of the voyage as described in the bottomry-bond, which says, "The master shall have liberty to touch at all ports and places within the limits of the voyage," and it is said that, there being no contradiction in the Act with respect to this averment, the Court ought to take it for granted that Cowes was out of the limits of the voyage. Now, where a fact is stated, and there is no contradiction of that

fact, *primâ facie*, the Court would assume such an averment to be true. But in this case I doubt whether the averment is an averment of fact at all. It is rather a statement of what is considered by the party proceeding in this cause to be the law. There is no doubt whatever of the vessel having gone to Cowes, and whether Cowes was out of the limits of the voyage, is not a question of fact, but a question of law, depending on admitted facts. I never yet heard it maintained, that because one party has stated a proposition of law, in an Act on Petition, that proposition was to be taken for granted, unless there was an express denial of it on the other side. If the case depended entirely upon the fact whether Cowes was or was not within the limits of the voyage, the Court would have been very anxious to be supplied with some information, from persons well acquainted with those matters, as to what would have been the view taken with respect to insurance cases. I confess that, if I had to decide the question as it stands, without reference to other circumstances, I should be a long time before I came to the conclusion that, looking at the situation in which the master was placed, the port of Cowes could be considered as out of the limits of the voyage. But, in my judgment, there are other facts and circumstances which must form a part of this question before I decide upon it. If Cowes was the most fit port, or one of the most convenient ports, for obtaining the necessary repairs, or the examination requisite prior to the repairs being made, then I apprehend, whether strictly within the limits or out of the limits of the voyage, the master would have exercised a just and sound discretion in resorting to that port. That it was necessary to go into some port I am perfectly satisfied. Now, what choice had the master, under these circumstances, looking at the season of the year, and the probable state of the weather? He might have gone from the Downs back to Ramsgate, or forward to Cowes, which appears to have been the nearest port. That his voyage was in the slightest degree likely to be lengthened by going to Cowes rather than to Ramsgate, I have not had even an assertion. Looking, Justifiable. then, at his condition on the 1st or 2nd February, I see no

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The Armadillo.

JUNE 17. reason why the master should not be justified in proceeding to Cowes.
The Armadillo.

On arriving at Cowes, a survey is taken, and the *bona fides* of this survey is in no degree impeached. Amongst others, it was made by a person who seems to have been for many years employed for such purposes by Lloyd's Coffee-house. The survey having been made, it was necessary that the vessel should be unladen. But Mr. Jackson, having been informed by a newspaper, that the vessel had reached Cowes, set off from Newcastle, and arrived at Cowes on the 8th of February. Now here arises a difficulty which the Court has not materials to deal with, as to the dates. I have no date in any of these papers, as to when the attempt was made by the master to sell the coals, or when the injunction was issued to prevent him. But it appears that the vessel, on the 23rd February, after the cargo had been unladen, fell over; and I must presume, in the mean time, the master intended to sell the coals, taken on the ship's account, to defray the expenses of surveying and repairing the ship. He is stopped by an injunction, and is subsequently arrested by Mr. Jackson. The master then pays over to him the proceeds of the coals, for the purpose (as I apprehend) of liquidating the demand which Mr. Jackson had against Eastman and Co., and against the master, on account of bills of exchange given at Newcastle. These were pretty strong measures; whether right or wrong, under the circumstances of the case, as related by Mr. Jackson, it is not necessary for me to discuss. Mr. Jackson reserves to himself the assignment of the freight which he had before obtained; and some further negotiation seems to have taken place between him and the master. A proposition is made by the master to the following effect—this is prior to the period when the vessel had fallen over, viz. the 10th February, 1841: "I will make this proposition to you: as my vessel is indebted to you some £800 or £700 sterling, if you will advance a sufficiency of funds to repair her, so that she can proceed to her destined port, I will give up the coals to you for your draughts on H. E. Eastman and Co. for £222, and by your taking another bottomry on her, I will bottomry my cargo,

which is valued at £5,000, to secure you on both bottomries. JUNE 17.
 If you cannot comply with the above, I can do no more for The Armadillo.
 you." Now, what is the effect of this letter? Does it not
 shew an inclination on the part of the master, under the cir-
 cumstances in which he was placed, *bonâ fide*, to do for Mr.
 Jackson all that was in his power? The effect of this Bona fides
of master.
 letter would be, to give up to Mr. Jackson the coals taken
 on board on the ship's account, and thereby to indemnify
 him against any loss by the bills; and further, if he were
 willing to advance what was necessary on bottomry, he
 would be secured by the whole cargo as well as by the ship.
 The master was not in a situation to do more; he had nei-
 ther credit nor funds in this country, and had, therefore, no
 means of making the requisite payments, so as to allow the
 ship to proceed on her voyage, except by raising the money
 in the manner stated. But is not this conclusive evidence
 (looking at least at the evidence on the other side) that he *bonâ*
fide intended to proceed to his port of destination? Have I
 any reason to characterize this as a fictitious letter, written
 with a fraudulent intention? What fraudulent intention? I
 have heard no single observation tending to shew that there
 was not a perfectly *bonâ fide* intention, when the letter was
 written, on the part of the master, to do all he could, not
 only for the benefit of the owners, but for the security of Mr.
 Jackson.

What are the facts which transpire after this? Various
 injunctions were applied for, by the shippers at Newcas-
 tle, which were ultimately dissolved, with costs. The next
 step is a survey, on the 9th of March, the master having
 been arrested on the 3rd. It has been stated, that the long
 delay between the 2nd February and the proceeding to as-
 certain the state of the vessel, in order to have the necessary
 repairs done, carries with it a fraudulent appearance. I must
 look at the explanation. I have an affidavit of W. S. Day,
 and I have also certain admitted facts. Mr. Day states that
 every endeavour was made to get the vessel either into dry
 dock, or the patent slip, at Cowes; but, in consequence of
 the extent of business then doing at these two places, it was
 impossible to get the vessel into dock until the period he

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*The Armadillo.*Delay at Cowes
accounted for,

states. I see no reason to doubt these facts; they are not contradicted on the other side, and therefore I am justified in assuming them to be true. The causes stated by Mr. Day go a great way to account for the delay imputed to the master. But are there no other reasons? Are not these injunctions matters which would interfere with the active despatch of business? Is not the arrest of the master one of the circumstances calculated to produce this delay? It appears that some of the injunctions, after having been dissolved by the Vice-Chancellor, were carried by appeal to the Lord Chancellor; and the final decision did not take place till the 16th April.

without imputation on master.

Contradictory
statements.

On the ground, therefore, of any unnecessary delay in proceeding to have this vessel examined for the purpose of repair, I see no sufficient cause for attaching any imputation to the master. But it is now stated, that the vessel is in such a condition that all repairs would be useless; that the master has had a "mock survey" made of the vessel, leaving out of that survey a person who ought to have been employed in it, namely, the agent for Lloyd's, and that it is useless to attempt to repair her, as her timbers are in such a rotten condition. Now, here statements are made which are somewhat startling. There are a number of affidavits made both at Cowes and Newcastle; but there is one fact of great importance admitted. After this vessel was repaired at Newcastle, prior to her setting off on her voyage a second time, and after the accident at the bar, she was surveyed by the surveyor of Lloyd's, and reported to be perfectly seaworthy. I apprehend that I must consider that survey not merely to have been made *bond fide*, but by a person duly qualified; and if so, what must be the effect of the survey? Can it be possible that the surveyor would make a survey merely to ascertain that the work was properly done, and pay no regard to the substantial condition of the ship with regard to her timbers; and that he would certify that she was perfectly competent to traverse the Atlantic to New York, when, in point of fact, she was rotten? If that were so, I should be inclined to come to the conclusion that a survey was a useless mode of proceed-

ing, or that the person who made it was very incompetent to his duty. I have the evidence of William Garritt, surveyor of shipping; he makes oath that "he inspected the brig *Armadillo* while in Mr. Young's dock at South Shields; and, in the deponent's judgment, the ship, from her state of unsoundness and decay, was not capable of being repaired so as to render her fit to traverse the Atlantic Ocean." I think it would have been as well if this gentleman had communicated that fact before she left the port. I think it would have been only consistent with common humanity. But, to my still greater surprise (this being the affidavit of a volunteer), I have now the evidence of Mr. Young, a ship-builder, who swears that "the vessel was taken into his dock, and was there properly and effectually repaired, to the satisfaction of Matthew Popplewell, the Lloyd's surveyor of the said port, who inspected her previously to her leaving the said port, and reported her sea-worthy." "From his experience and knowledge of business, he is competent to form a belief, that, without accident or bad weather, it is perfectly impossible that any vessel, after being so properly and effectually repaired as the said brig was at Shields, in this deponent's dockyard, could be in the condition described by the master, unless from the rotten and decayed state of her timbers, and insufficient shifting of her planking, previous to the accident which occasioned her being brought into the deponent's dock for repairs." Now certainly I should hesitate before I gave credit to a statement which, according to this individual, supposes that a vessel which he himself repaired, and which he states was perfectly and effectually repaired, was seaworthy, "unless from the rotten and decayed state of her timbers." In my judgment, the two affidavits are utterly inconsistent with the facts stated in the evidence of Mr. Young himself, and the survey made by Mr. Popplewell; and I am bound to assume that the vessel, when she left Newcastle, was in a seaworthy condition.

I now come to the survey made at Cowes; and the complaint made is, that upon the second survey, on the 9th of March, Mr. Spain, a surveyor of Lloyd's, was not employed.

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It is said that the fact of his being an agent for the shippers of the cargo was the very reason why he ought to have been employed; and, certainly, in ordinary cases, I should have said there was no reason why he should not have been employed while acting on their behalf. But I am to recollect that, in this particular case, there were proceedings commenced in Chancery; that the parties were hostile; that they were, in fact, at daggers-drawn; and, seeing the part Mr. Spain had taken, I do not think he is entitled to assume the character of a surveyor employed by Lloyd's, but of the agent employed by the shippers; and I cannot think it is at all advisable that he, who pretends to make a survey as a disinterested person, deriving weight and character from the station he holds, should be the agent of any one party. But these gentlemen swear that the vessel would cost more to repair her than she is now worth. On the other hand, there is an affidavit, made by three persons, stating that the whole expense would not exceed £100; and finally there is an affidavit made by a person who describes himself as residing at Portsmouth, and shipwright surveyor to Lloyd's New Register Book for the port of Portsmouth, who states that she is perfectly worthy of repair: "The repairs necessary to be done to the brig to put her in a seaworthy condition are as follow;" and he says they would not amount to more than £150.

No fraud as to
state of vessel.

Then, with respect to this part of the case, I am clearly of opinion that there is nothing in it which ought to induce me to believe that the master had any fraudulent intention with regard to the repair or condition of the vessel; and, further, that the expense likely to be incurred is not of such an amount as would render the prosecution of the voyage entirely inconsistent with the interests of the owners of the vessel; but if the expenses were of any amount, I have yet heard no argument, unless the case be connected with fraud, which would entitle me to say, that the master has not a perfect right to take up a second bottomry-bond, and to use his utmost exertions for the completion of the voyage. I am well aware that such a proceeding might be exceedingly detrimental to Mr. Jackson; but this is the very risk he runs

when he takes the bond ; it is upon this very account that he takes the large interest of 25 per cent. upon the arrival of the vessel at New York—the chances that the vessel may meet with accident, and that another and a later bond would be taken, which would be first entitled to payment.

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Finally, the Court is asked to order a new survey to be made. I see no ground whatever for any further proceedings. Mr. Jackson has, in the judgment of the Court, proceeded against the master and the ship with a severity not justified by the circumstances of the case. I think there has been an attempt to enforce from the master, a foreign master, the very utmost that the power of the law could effect. I think there is no ground for resorting to the jurisdiction of this Court ; that there is no claim on its justice or its equity, and I shall order the warrant to be superseded, and condemn Mr. Jackson in the costs of the proceeding.

Proceeding of the lender unjustifiably severe.

Warrant superseded, with costs.

THE "GANGES."—*Act on Petition.*—This was an action by the master, owner, officers, and crew of the barque *Medora*, against the barque *Ganges*, her cargo and freight, for a remuneration for salvage services alleged to have been rendered to that vessel on her voyage from India. Both ships left Bombay nearly at the same time, the *Medora* on the 9th, the *Ganges* on the 11th May, 1840, on their voyage to England. The *Ganges* was teak-built, but 36 years old, and five of her crew only were Europeans, the remainder being Asiatics. Having, soon after leaving the harbour (on the 12th), struck against some fishing stakes, she sprung a leak, but it was not till 25th May that the leak excited any alarm. On the 26th, in consequence of a signal from the *Ganges*, Harrison, the master of the *Medora* (which had fallen in with her on the 21st May), sent his carpenter on board, and at the request of Steel, the master of the *Ganges*, consented to keep near, lest the leak should increase. Capt. Harrison went on board the *Ganges*, kept up the courage of the crew, and added his advice to the services of his carpenter. On the 30th, Capt. Steel wrote a letter to Capt. Harrison, wherein he stated as follows : " The *Ganges* still con-

Salvage. — Services rendered by a vessel sailing in company with another, not entitled to a large compensation. — Excessive bail.

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The Ganges.

tinuing to make more water, notwithstanding our having such fine weather and smooth water, it is the request of myself and officers, that you will continue to keep company with us until we reach the Isle of France, or some other port, in safety; considering, for the sake of the crew, ship, and cargo, and all concerned, in the leaky state the *Ganges* is now in, it would be wrong to proceed further, but get the ship as quick as possible into the nearest port." Capt. Harrison agreed to accompany the *Ganges* to Port Louis, which they reached on the 16th June, and where the vessel was repaired. For this service, and for the deviation of the *Medora* from her proper route at that season of the year, a claim for salvage was made. The vessel, cargo (consisting of cotton, gum, and sundries), and freight, were valued at £16,000. Bail had been taken at £5,000.

ARGUMENT.

Sir J. Dodson, Q. A., and Nicholl, D., for the salvors. Capt. Harrison, at the risk of his own valuable cargo, and to the delay of his voyage, at the request of Capt. Steel, staid by the *Ganges*, and accompanied her to a place of safety; he is entitled to a considerable reward for the services rendered to this large amount of property.

Addams, D., and Robinson, D., for the mortgagee of the vessel and consignees of the cargo.

JUDGMENT.

DR. LUSHINGTON.—That Capt. Steel considered, when he addressed the letter to Capt. Harrison, that the vessel and the property, as well as the lives of those on board, were exposed to considerable risk, I entertain no doubt; he would not otherwise have expressed himself in such terms, for there was no reason why he should have exaggerated the risk. But, on the other hand, it appears to me that there was no immediate danger at that time; though he might think that, if bad weather had come on, the leak, which had continued to gain upon them, notwithstanding fair weather and a smooth sea, might place them in circumstances of great danger. Capt. Harrison agrees to accompany the *Ganges* to Port Louis, and undoubtedly the leak, on the 11th June, had become dangerous, because there were four feet water in the hold, and in the Protest it is expressly stated, that it was necessary to proceed to the Mauritius for

Danger not
immediate,

but increasing,

the safety of the lives on board. It has been said that, when Capt. Steel consulted the masters of the *Medora* and the *Lady East*, the only subject of consultation must have been, whether the *Ganges* should be abandoned or not. I cannot go the full length of this observation, because there are no circumstances to satisfy my mind that there was any immediate intention of abandoning the vessel; they go merely to shew that a state of things might occur, which would render the abandonment of the ship necessary. During the interval between the 30th May and the 11th June, Capt. Harrison had remained by the vessel, and a code of signals had been arranged, which shews that a case of considerable urgency might arise, for the last signal is expressly said "to be used in case of imminent danger." All the other assistance rendered is comprised in the general observation, that Capt. Harrison gave his advice and encouraged Capt. Steel in his determination to proceed to the Mauritius, and afforded him the aid of his carpenter and joiner.

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The Ganges.

Now I am clearly of opinion that some service was rendered by Capt. Harrison, and by the aid of those on board his vessel; the only question is, the extent of the service. That any great labour was undergone by himself or his crew, or that any great risk was incurred by the ship or cargo, cannot be pretended. The principal ground on which it is alleged that there should be a considerable extent of salvage allotted is, that there was a deviation of 500 or 600 miles, and that the great increase of risk to the *Medora* thereby ought to be considered. Now, certainly, when I find some nautical men swearing that it is totally unusual to resort to the Mauritius in such a season of the year, and that it would entail a deviation from the course of six to eight degrees, and other nautical men, with equal experience, swearing the contrary, and that it is little, if at all, out of the way, the Court is placed in some difficulty to know where the truth lies. But this observation is entitled to some weight: "How came it that the *Lady East* should have approached within a short distance of the Mauritius, and that the *Medora*, which touched at the Mauritius, should have arrived at St. Helena before the *Lady East*?" I conceive the case was

Some service rendered.

Deviation;

- JUNE 17. *The Ganges.* this: when the vessels sailed from Bombay, in May, it depended upon the state of the wind and weather, whether their course should be to the Mauritius, or whether they would be much out of the ordinary course; and I cannot help thinking that the *Medora* was not taken any very great distance out of the course proper to be pursued, and she could not have been much delayed if she arrived at St. Helena three days before the *Lady East*.
- Service not high. The value of the property is considerable, but I think the service is not one which ought to receive a high degree of compensation. I consider that it is not quite a service that ought to be rendered gratuitously; but I think that where
- Services rendered by vessels in company with each other. vessels proceed on the same voyage, leaving port nearly together, and where assistance is rendered by one to the other without any great deviation from the proper course, the amount of salvage ought not to be very considerable. I think, therefore, that £300 will be quite sufficient for all that was done. I think the vessel and cargo were arrested
- Bail too large for a larger amount than is justifiable.

Prerogative Court of Canterbury.

JUNE 19.

Tearing of a will by a testator, who afterwards repented.—*Primâ facie*, a revocation.

IN THE GOODS OF FREDERICK BROWN COLBERG, DEC.—*Motion*.—The deceased died 17th October, 1840, leaving a will, dated 2nd September, 1840, and a codicil (not dated) written on the back of the will, and executed at the same time as the will. The paper, on which the will and codicil were written, had been torn into four pieces, and again stitched together. The will, amongst other bequests contains the following: "I give and bequeath to my friend John Gibson, of Hartlepool, my gold watch and seals." These words were struck out with a pen, and to the legacy of a succeeding legatee the following words were added by interlineation, in the deceased's hand: "and my gold watch and seals also unto him, in case he should survive me; but if not, then —." It appeared from the affidavit of J. H.

(a markswoman), that she was present when the deceased executed the will and codicil; that, after the execution, Gibson (who was also present), to whom the deceased had left the watch and seals, requested the deceased to allow him to take care of the will, to which he assented, but said he should require it again shortly; that, after Gibson left, the deceased desired the deponent to go next morning, and bring back the will, which she did, and delivered it to the deceased, who said, "That weary, weary doctor had plagued my life out about the gold watch and seals, that I put them in my will, but it is unlikely I should leave them to him;" that the deceased then made the alteration in the will, and in talking about Gibson, and the way in which he had, from time to time, pressed him to leave him his watch and seals, the deceased got angry and tore the will; but, immediately after, repenting of what he had done, desired his housekeeper (J. S., the principal legatee) to stitch it together, saying he did not mean to destroy the will, or wish it to be otherwise than it was, except only as regarded the watch and seals, and that he had done it at the moment merely on account of the doctor's vexing him, for which he was sorry, as every thing was perfectly to his mind otherwise, and that it fatigued him too much to write it again; that J. S. stitched the paper together, in the deceased's presence, and he then gave it to her, desiring her to take charge of it, repeatedly saying that the will and codicil were as good as before the sheet was torn, as he never contemplated revoking or destroying the same except as regarded the watch and seals.

JUNE 19.

Colberg, dec.

Deceased, in a fit of anger, tore the will, but repented, and declared he did not mean to revoke it.

Addams, D., in support of the motion for probate, submitted that, notwithstanding the appearance of the paper, it was not revoked, under the express terms of the Act, the tearing not having been done *animo revocandi*, but in a fit of momentary spleen, and the deceased afterwards repented of what he had done. ARGUMENT.

SIR H. JENNER.—The question is, whether the paper was torn by the deceased with the intention, *at the time*, of revoking the instrument; for although he stated afterwards that he only meant to revoke the will as regarded the gold JUDGMENT.

JUNE 19. watch and seals, which he meant to give to another person, the question is, whether *primâ facie* the instrument was not altogether revoked at the time, although the deceased might afterwards have repented. If the paper were to be propounded in an Allegation, and witnesses were examined in support of it, the Court might be of opinion that he had no intention to revoke it; but *primâ facie*, being torn into four pieces, it must be presumed to be revoked till the contrary be shewn. Mr. Gibson is mentioned in the codicil: "Any books in my library which my friend John Gibson, mentioned in my will, may choose to select out from among them;" and it appoints that gentleman one of the executors. There is not sufficient in such an affidavit as this to shew that the instrument is not revoked, or that there was a republication.

Colberg, dec. Question if not a revocation in fact, *primâ facie*.

Absence of intention must be shewn.

Must be a decree or consent.

There must be a decree against the next of kin, or a consent. On a proxy of consent, probate may issue. I should hold that the testator had not done all he had intended to do, as in *Doe d. Perkes v. Perkes*.*

JUNE 29.

Unattested alterations in a will dated prior to the statute, without information as to time — Court will not decide on motion, if opposed, however strong the presumption.

IN THE GOODS OF GEORGE JACKSON, DEC.—Motion.— The deceased died 3rd April, 1841, leaving a will dated 5th May, 1837, and five codicils, three of them operative; the other two inoperative, not being executed in conformity with the statute. In the will, a legacy had been reduced by erasure and interlineation in the deceased's own hand, without date or attestation, nor could any information be given as to the date of the alteration.

ARGUMENT.

Addams, D., moved for probate of the will as it stood. On the general presumption of law, and on probability, the Court is bound to hold that the alteration was made anterior to the 1st January, 1838. The general presumption of law is, that a British subject is cognizant of the law, and if a thing may be done legally or illegally, the Court will presume that it was legally done, in order to give effect to the act; and that, if a testator intended to alter his will, he

Presumption of law.

* 3 B. & A. 469.

would take care to do it according to the form which the statute provides, and not in a mode which it does not sanction. JUNE 29.
—
Jackson, dec.

Harding, D., opposed the motion. If there be any doubt, the Court will not decide on motion against the interest of a legatee. The presumption, that the deceased would comply with the law, is inconsistent with the fact, that here are two codicils not executed in conformity with the provisions of the law. Presumption rebutted.

SIR H. JENNER.—This being an opposed motion, I must leave the party to propound the will. I cannot dispose of the question in the way of motion, if opposed, on any presumption, however strong. JUDGMENT.

Judicial Committee of the Privy Council.

JULY 1.

BROOKE (FORMERLY REEVE) v. KENT.—*Appeal.*—*Allegation.*—This was an appeal from the Prerogative Court of Canterbury, which, on the 13th of February, 1840, rejected* an Allegation propounding and praying probate of the will, as it originally stood, of Mr. William Brooke, who died on the 28th of June, 1839, the will bearing date the 15th of July, 1837, with a codicil dated the same year. By the will (which disposed of real and personal estate, and was executed in the presence of three witnesses), the testator empowered each of the persons made tenants for life of his real estates thereby devised, to appoint to the use of any woman he might marry, for her life, as her jointure, £200 a year, issuing out of the said estates. The Allegation given in by Mr. John Brooke (heretofore Reeve), one of the executors, against the other executor, pleaded that, on the 26th of June, 1838, the testator, with a knife, erased this amount of annual jointure, and altered the sum to £100, writing under the clause of attestation, at the end of the will, a Construction of Act, 1 Vict. c. 26, in respect to alteration of wills.—Statute applies to alterations made after 1st Jan. 1838 in wills dated prior thereto.—§ 21 requires intention on the part of the testator, which is to be ascertained as under Stat. of Frauds.—Judgment of Prerogative Court, excluding evidence *dehors* the instrument, reversed.

* See 7 *Monthly Law Mag.*, 84.

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memorandum of what the alterations were,* and signing the same; but they were not attested agreeably to the new Act. The Allegation exhibited the draft of the will, containing the words as they originally stood. The Judge in the Court below held that, although nothing could be more clear than the intention of the testator—namely, to reduce the annual charge upon his estates for jointure from £200 to £100—yet the alteration, not being executed in the presence of two witnesses, was void under the 21st section of the Act, “except so far as the words or effect of the will before such alteration was not apparent;” and the testator having erased the words so as to render the original sum not apparent, he could not pronounce for either, the Court not being at liberty to admit other evidence than appeared on the face of the will itself.

Mr. Brooke appealed to this Court, where Mr. Kent gave in an Allegation, pleading that, the will having been originally executed prior to 1838, the alterations were valid and effectual.

JUDGMENT.

DR. LUSHINGTON delivered the judgment of their Lordships.

What Court below ought to have done prior to statute.

It may be expedient to consider, what the Court of Probate ought to have done had this case occurred prior to the passing of the statute—in what shape probate would then have been decreed to pass.

Alteration relates to freehold exclusively;

over which a Court of Probate has no jurisdiction;

It must be recollected that, though the will contains bequests of personalty, as well as devises of land, this clause, both as it stood originally, and as altered, relates to freehold exclusively; that the Court of Probate has no jurisdiction over devises of freehold, and that the probate is not evidence with respect thereto. If the Court of Probate had applied to such circumstances the law as laid down in various

* “The erasures in the twenty-third line of the sixth sheet, the word ‘two’ taken out, and the word ‘one’ put in its place; and in the first line of the seventh sheet, the word ‘four’ taken out, and the word ‘two’ put in its place, and in the fifth line of the seventh sheet, the word ‘four’ taken out, and the word ‘two’ put in its place,—by me, William Brooke, June the twenty-sixth, one thousand eight hundred and thirty-eight.”

cases, it would have restored the will to its original state, for it is quite clear that the obliteration was made only with a view to give effect to the intended substitution, and such substitution failing for want of execution, according to the Statute of Frauds, the obliteration and words substituted would not work a revocation, but the will would operate as originally executed.

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and under Stat. of Frauds, will would operate as originally executed.

But it is believed that there is no case in which a Court of Probate ever attempted so to deal with a devise of real estate; indeed, it may be doubted whether any case similar to this ever was the subject of discussion. On the contrary, there can be little doubt that, had this case occurred before the new statute, probate would have passed of the will as altered, together with the memorandum at the foot. Probably, the Court of Probate, before the statute, would have said that it had no jurisdiction over real estate, and could not judge of devises thereof; that those alterations, coupled with the memorandum at the foot, would have been effectual had the property been personalty (as no doubt they would), and that its probate must be governed by the rules governing wills of personalty only, and probate would have passed of the will as altered, together with the memorandum.

No case in which a Court of Probate so dealt with devise of real estate.

Court would have been governed by rules applied to personalty.

Now, assuming that the new statute does not extend to this will, if the preceding observations are well-founded, it would follow that the judgment of the Court below must be reversed, and that, the necessary facts being proved or admitted, probate must pass of the will as altered, together with the memorandum: for in that case, the rules applying to the probate of wills of personal estate prior to the statute, must take effect. This leads to the consideration of the statute.

Therefore, if new stat. does not apply, alterations are valid.

It is desirable, first, to consider what were the objects of the statute, and the leading principles on which it is framed. The second section repeals all former statutes respecting wills of real and personal estate. The Act then proceeds to prescribe the form in which all wills of realty and personalty shall be executed. It further provides for the revocation of wills in whole and in part, and for the rules to be

Objects of the statute.

JULY 1. followed in making alterations, and there are then sections as to the construction.

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To provide one uniform mode of executing, revoking, and altering all wills.

The object of the statute, it seems, was, by providing one uniform mode of executing all wills, of whatever description the property might be, and one uniform mode of revocation and alteration, to do away all the anomalies and mischievous distinctions which had prevailed as to the disposition by will of property of different kinds.

Section fixing date of operation of statute.

The statute passed on the 3rd July, 1837, and would have come into immediate operation, had it not been for the 34th section, which provides that the Act "shall not extend to any will made before the first day of January, 1838, and that every will re-executed, or re-published, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived; and this Act shall not extend to any estate *par autre vie* of any person who shall die before the first day of January, 1838."

Its true construction, difficult.

In attempting to discover the true construction of this section, it cannot be denied that there are difficulties in every view of the case. It is evident that some such provision was absolutely necessary, otherwise all wills made prior to the passing of the Act would immediately have been subject to its operation, and a very large part would have become null and void. Again; it was necessary that some time should be suffered to elapse, to give people an opportunity of becoming acquainted with the enactments of a statute which affected so very large a proportion of the nation. Again; it might be considered a hardship to compel persons, who had already disposed of their property by will according to the existing law, or who might do so within so short a period after the passing of the statute as to be in excusable ignorance of its provisions, to incur the trouble of republishing their wills according to the new law. The

Whether all wills made before 1st Jan. 1838 are altogether out of the operation of statute.

reasonable time fixed by the Legislature is the 1st January, 1838; and the question is, Whether all wills and codicils made before that date are altogether and for ever out of the operation of the Act, or, if not wholly, but in part, what parts, and for how long a period?

Now, it is clear that all wills and codicils made before the 1st January, 1838, are not altogether and for ever out of the operation of the Act, and to be governed by the old law; for if they were, they might be re-executed according to the old law, or republished according to the old law, or revived or altered by a codicil executed according to the old law. But this same 34th section provides for the contrary; for every will and codicil, though made before the 1st January, 1838, if re-executed, re-published, or revived by codicil, shall be deemed to bear date at the time it was so re-executed, re-published, or revived by codicil. Now, if such re-execution, re-publication, or revival by codicil took place after the 1st January, 1838, the whole instruments bear date at such time, and consequently are out of the exception and within the Act. It seems obvious, therefore, that, in these three most important particulars, wills dated before the 1st January, 1838, may come within the Act, if re-executed, re-published, or revived by codicil subsequently to the 1st January, 1838. A further consequence is this, that, after the 1st January, 1838, no codicil can be made to a will executed before, save according to the statute, bringing such will within the statute; for every codicil to a will of personality is a re-publication, and consequently must be executed according to the Act.

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Reasons why they cannot be so.

In certain particulars, wills dated before 1st Jan. 1838 come within statute.

If then, for the purposes already mentioned, a will dated before the 1st January, 1838, must be governed by the statute, the next question is, as to alterations made by obliteration, or by the insertion of words in the body of the will; but if such obliterations or alterations are not governed by the statute, then this consequence would follow—that a codicil, of slight importance (as might be the case), would fall within the operation of the statute, and be void, because not executed according to the statute; but an alteration in the body of the will by obliteration or the insertion of words, being governed by the old law, might take effect, though affecting or changing the most important dispositions in the will.

Alterations subsequent to stat. of a will dated prior to 1st Jan. 1838,

If such were really the state of the law, it would not be reconcileable with any sound principles, and its operation in-

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the present case would be, to render void the codicil executed validly according to the old law, and to leave these obliterations and alterations to the operation of the old law, as it stood prior to the passing of the statute. It must always be recollected that, with regard to *personalty*, the object to be effected by codicil, obliteration, or the insertion of words, is the same, namely, to effect an alteration.

fall under the statute.

For these reasons, it appears to their Lordships, that the obliterations and insertions of words in the body of the will fall under the statute, and so far the judgment of the Court below is well founded.

What stat. directs as to such alterations.

We have then arrived at this point :—What does the statute direct to be done in cases of obliteration, interlineation or alteration ?

§ 20

The two sections which require to be considered are the 20th and 21st. The 20th enacts “that no will or codicil, or any part thereof, shall be revoked otherwise than as afore-said, or by another will or codicil, executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed; or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.” It is quite clear from these words, therefore, that an intention to revoke is absolutely necessary to effect a revocation by burning, tearing, or otherwise destroying. By construction, a similar effect was given to the Statute of Frauds; but the words “with the intention of revoking the same” are not to be found in that statute.

requires an intention to revoke.

Similar effect given to Stat. of Frauds by construction.

§ 21.

The 21st section enacts “that no obliteration, interlineation, or other alteration, made in any will, after the execution thereof, shall be valid, or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator, and the subscription of the witnesses, be made in

the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration. and written at the end or some other part of the will." The first point for consideration as to this section is, whether "intention" must not accompany the acts, in the same way as it must accompany the acts mentioned in the 20th section. Unless this construction be given to the 21st section (as it must necessarily be applied to the 20th) some very absurd consequences might follow. Burning or tearing a will, without intention to revoke it, would not revoke the instrument, or any part of it; but obliteration, without intention, might render ineffectual the most important part. The Legislature never could mean that intention should be indispensable to give effect to burning or tearing, and not to obliteration with ink, or something similar.

JULY 1.

Brooke v. Kent.

Whether it does not also require intention.

If not, absurd consequences might follow.

In all these cases, under the Statute of Frauds, and under this Act, *intention*, then, is indispensable. Under the former statute, to burn, or to tear, or to obliterate, a part of a will, was altogether a nullity, if such act was done *sine animo revocandi*, and only for the purpose of making immediately some new disposition or alteration; and if from want of compliance with the statutory regulations such new disposition or alteration could not take effect, then the burning, tearing, or obliteration, in no degree revoked the will, but it remained in full force, as if nothing had been done to it. Similar principles must be applied to cases arising under the present statute: there is nothing in the statute which tends to a contrary conclusion.

Intention is indispensable;

Then how is the intention of the testator to be ascertained in this and other similar cases? Precisely by the same rules of evidence which were applied to wills whilst the Statute of Frauds was in force—the same evidence that was received in *Bibb v. Thomas*,* *Onyons v. Tyrer*,† and in all the subsequent cases.

How intention to be ascertained? By same rules as under Stat. of Frauds; and same evidence.

In the present case, there is abundance of proof (assuming the facts stated in the Allegation to be true) that the testator did not intend to revoke absolutely—he meant to revoke by

In present case, sufficient proof of absence of intention to revoke absolutely;

* 2 W. Black. 1043.

† 1 P. Wms. 345.

JULY 1. substituting different sums for those originally devised. The alterations cannot take effect, because they are not executed according to the statute. Therefore, in conformity with the old established principles and a long train of decisions, the revocation is ineffectual, and the will must stand in its original state. The hand-writing of the testator, and the paper intended for a codicil, establish all the necessary facts on which to found this conclusion.

Brooke v. Kent. intention was to revoke by substitution. The substitution ineffectual; consequently, the revocation.

The effect of this is, that their Lordships agree with the Court below in considering this case to fall within the statute; but they conceive that the point to which I have more particularly adverted was not directly brought under the consideration of the learned Judge, namely, that this was not an absolute revocation, but merely an intention to revoke by substituting an alteration. The learned Judge in the Court below rejected the Allegation pleading the facts and requiring probate of the paper in its original state. Their Lordships are of opinion that they must reverse the decree of the Court below, admit the Allegation, and reject the Allegation given in in this Court, retaining the cause.

Decree of state. Their Lordships are of opinion that they must reverse the decree of the Court below, admit the Allegation, and reject the Allegation given in in this Court, retaining the cause.

Decree of state. Their Lordships are of opinion that they must reverse the decree of the Court below, admit the Allegation, and reject the Allegation given in in this Court, retaining the cause.

Probate of (The facts being admitted, their Lordships decreed probate of the will in its original state;—all costs to be paid out of the estate.)*

Prerogative Court of Canterbury.

JULY 8.

ALTERATIONS IN A WILL, WITHOUT EVIDENCE AS TO DATE, OR DECISIVE CIRCUMSTANCES, PRONOUNCED FOR. **IN THE GOODS OF GEORGE HARTLEY, DEC.—*Motion.***—The deceased, on the 31st May, 1841, in his way from Dover to London, was taken ill at Gravesend, where he slept. In the course of the afternoon, he drew a will with his own hand, and executed it in the presence of two of the waiters of the inn, and from their affidavit (there being no formal clause of attestation), it appeared to have been exe-

* The Committee consisted of Lord Brougham, Lord Chief Justice Denman, Mr. Baron Parke, and Dr. Lushington.

cuted in compliance with the Act. Next day, he left Gravesend, and arrived at his house in London, where he died the following morning, 2nd June. On the face of the will, when inspected after his death, several alterations appeared: the testator had bequeathed legacies of £30 each to three ladies named Lee, and a legacy of £20 to another lady of the same name. The former were altered from £30 to £20. No information could be obtained as to when the alterations were made, neither of the witnesses having observed them.

Pratt, D., moved for probate with the alterations, ob- **MOTION.**
serving that, from the regularity of the will, it was probable they were made prior to execution.

SIR H. JENNER.—Under the circumstances of this case, **JUDGMENT.**
the Court must find its way as well it can. I think there is enough to satisfy the Court that the alterations were most probably made before execution, because there is a sum of Circumstances. £20 bequeathed to Mary Lee, not upon an erasure, but uniformly written, and it is extremely probable that, after he had given £30 each to three members of the family, he found, on calculation, that he had given more than he intended to give, and coming to the fourth, to whom he gave £20, he determined to place all upon an equality. By the Consent. consent of the legatees whose interests are affected, the Court may safely decree probate of the will as altered. There is an addition which would seem to have been made after execution, which must be rejected as part of the will. It is written on the margin of the paper, and is not any part of the will.

Probate of the paper decreed, as altered, with the excep- **Probate as**
tion of the clause in the margin. **altered.**

IN THE GOODS OF CATHERINE PARKE, WIDOW, DEC. Alterations in
—**Motion.**—The testatrix died in May, 1841, leaving a will executed
brother, her next of kin. After her death, there was in 1836, with-
found in the drawer of a writing-table, in her dining-room, out evidence as
an envelope, containing a will (A), dated 15th July, 1836 to date.—The
(without a clause of attestation), executed in the presence of motion, in these
two witnesses; also a form of a clause of attestation (C), cases, must be
specific, and
not in an alter-
native.

JULY 8.

Parke, dec.

Nature of alterations.

and a testamentary paper (B), of nearly the same tenor as (A), with the clause of attestation added, but unexecuted. The papers (A) and (B) were both in the deceased's hand-writing. The first clause in paper (A) was as follows: "I give and bequeath to my nephews and nieces, W. W. S. [an annuity of £50 per annum, to] R. S., S. S., &c. (five others), when arrived at the age of twenty-four years each, the whole of my property in the funds, in land, or in houses [horses, carriages, plate, linen, books, glass, china, &c.], to be equally divided amongst them, but subject to the following annuities, viz." The passages included in brackets were interlined. The next clause was obliterated, but could be decyphered as follows: "£10 a year to A. G., my cook; £10 a year to S. P., my housemaid; and £10 a year to my footman, W. H., for their [altered to "her"] lives [altered to "life"], and at the [altered to "her"] death of each [the two last words obliterated] to cease, and revert and be divided amongst my said nephews and nieces." It then gave annuities of £50 each for life to two friends, C. A. C. and C. S. and directed her broaches, necklaces, earrings, &c., to be equally divided amongst her nieces, together with all her new wearing apparel, &c., and then follows an obliterated clause, which gave her gowns, &c., to S. P., her housemaid; and it appoints her nephew, R. S., executor. The paper (B) contained a similar bequest of the bulk of the property to her nephews and nieces, without the limitation of the interest of W. W. S. to an annuity of £50, and including her "horses, carriages, plate, linen, books, &c.," without interlineation; it omits the two annuities of £50 to C. A. C. and C. S., and exhibited the same alteration as in (A) with respect to her cook and housemaid, and repeats the appointment of R. S. as executor. Neither of the witnesses to the will (A) had any knowledge of the interlineations or obliterations in it, nor could any direct evidence be adduced as to the time when they were made. The paper (C) was in the hand-writing of Dr. W. S., one of the witnesses to the will, but he (being upwards of eighty) could not recollect his having given the deceased the paper, or even attesting her

Circumstances, will. W. H. (the footman) remained in the deceased's ser-

vice, and in her favour and confidence, till after January, 1838, and died in that year. S. P. remained in her service till June, 1838, when she quitted, and died in December or January following. A. G. quitted the deceased's service about two or three years ago, but the precise time could not be stated. The property amounted to about £16,000. The Rev. W. S., the brother of the deceased, had executed a proxy of consent to probate of (A); W. W. S. had executed a proxy of consent to probate with the interlineation of "an annuity of £50" to him; five of the persons whose interest could be prejudiced by the omission of that interlineation were minors.

JULY 8.

Parke, dec.

Curteis, D., moved for probate of the will (A) as it originally stood, without any of the obliterations, or alterations, save the interlineation "horses, carriages, &c.," and the words "of each."

SIR H. JENNER.—This is one of the difficulties in which the Court is placed under the Act. It has no information as to the time when the alterations were made, as neither of the witnesses present at the execution observed any alteration in the will, and the alterations are so conspicuous that they could hardly have escaped their observation if they had been there at the time.

It appears, with respect to some of the legacies to servants in the deceased's employ at the time when the will was executed, in July, 1836, that they left her service in the beginning of 1838, and it is probable, therefore, that she obliterated them after 1838; these obliterations, therefore, are of no effect, since the words are legible on the face of the paper. But there is one very important alteration. As the will was originally executed, the nephew, W. W. S., had a share of the whole property equal to that of the other nephews and nieces; whereas, by this alteration, his interest is confined to an annuity of £50, instead of one-eighth of £16,000. That this alteration was made after the execution of the will, I have no doubt, from the colour of the ink; but whether before 1838 or after, the Court has no means of forming an opinion, except from the very loose circumstance of the colour of the ink, which corresponds with that

MOTION.

JUDGMENT.

Circumstances.

JULY 8.*Parks, dec.*

of the obliterations relative to the maid, S. P., and is certainly much lighter than in the body of the will. It is true, there is a proxy of consent to probate passing as the paper now stands, with the annuity of £50; but the prayer is for probate without that alteration. The paper was placed in an envelope, endorsed "My will, 5th August, 1836," it having been executed on the 15th July, 1836; therefore, it is not at all improbable that the deceased, after she had executed the will, in July, revised it, and inserted this annuity of £50 to W. W. S. The colour of the ink is too slight a circumstance to rely upon. What is the Court to do? If it were to grant probate of the will as it now stands, it would affect the interests of minors. The proxy of consent of the brother, who appears here not as father of the minors, but on his own behalf, is not such a consent as the Court would require; but I cannot see why his consent was required at all. [*The Proctor*.—Under the impression that the paper might have been abandoned by the deceased.] How can it have been abandoned? I cannot decree probate without any of the interlineations, as that would put W. W. S. in a situation which the deceased did not intend when she inserted the annuity of £50. All I can do is to reject the motion, and leave the party to take the course he may be advised to take. Why was probate prayed without the alteration? [*Curtis*.—Because that seemed the proper course; but the other party is willing to take the smaller interest; the parties desire to get a representation.] Parties must make up their minds; I cannot entertain motions in the alternative; the Court will not take motions in that form. If the parties be willing, the Court will decree probate of the paper with the interlineations of "an annuity of £50 per annum," and "horses, carriages, &c." I think the other alterations were made after 1838; as respects two of the servants, it is clear that they did not leave the deceased's family till after 1838.

Motions must
not be in an
alternative.

Probate with
consent.

Unattested
alterations in a
will and codicil

IN THE GOODS OF FRANCES SELL, DEC. — *Motion*. —
The testatrix died 21st May, 1841. In November, 1838,

will was prepared for her execution in duplicate ; one part has not been found, and it is not known whether she executed it ; but on the 3rd August, 1840, she executed the other part (which bore date 9th November, 1838), together with a codicil. The attesting witnesses, W. Q., and his wife, S. Q. (in whose house the testatrix resided, in August, 1840), deposed that, prior to the execution, she told them that she had made all the alterations in her will which she considered necessary, and wished to execute it ; that she then produced the will and codicil, subscribed her name to each, and declared the same to be her will, both of the deponents being present at the same time, and they witnessed the papers. The testatrix immediately afterwards, in their presence, inclosed the will in the codicil, sealed the same with three seals, and deposited the packet in a tin box, whence it was taken, on the 24th May, by the executrix, the papers being sealed up in the same manner as when deposited there. They further deposed that, at the time of execution, they observed several alterations in the papers, and particularly, in the codicil, writing from the signatures to the bottom of the page, and that the alterations and additions were in the testatrix's hand-writing. Both the papers exhibited obliterations and interlineations, which were unattested, and in the codicil was an addition at the top of the second page, unconnected with the words on the preceding page, or with what followed them, to the following effect : " What little there may be in the Oxford Savings' Bank I intend for the orphan boys, independent of any thing in the other little I have left them ;" and under the signatures of the witnesses (which were written upon an erasure, as if part of the added matter had been expunged to make room for them) was a long addition, beginning (imperfectly) " Paviors be dead before they are apprentices, in the event of that," &c. &c. This addition was signed " Frances Sell," and dated " 11th August, 1840." Under this signature was another addition, unsigned. The sealed paper was endorsed " To be given to Mrs. Sarah Ellis," the executrix. The property was under £450.

JULY 8.

Sell, dec.

pronounced for.
— Additions following the signature excluded from probate. —
Dates not those of execution.

JULY 8. who did not administer to her effects. He married again, and died 27th May, 1830, intestate, leaving his second wife surviving, who was entitled by the custom of London to three-fourths of her husband's property. She took out administration of his effects, and died in 1838, and the property which had belonged to A. S. still remained invested. The widow made a will, whereby she appointed executors and a residuary legatee; such residuary legatee, being one of the executors, now prayed the Court to grant administration to him of the property of A. S., as representative of the administratrix of R. S. The motion had been made on a former day, and stood over to ascertain whether the husband, R. S. had a vested interest in the property.

Sowerby, dec.

of the second wife (widow) deceased, in the first instance, without a decree against the next of kin of the husband.

JUNE 9.

ARGUMENT.

Course of office per Sir E. Simpson.

Nicholl, D., now renewed the application. The course of office appears from a MS. note of Sir Edward Simpson,* who, adverting to *Hole v. Dolman*,† says: "The rule there seems to mean only to the next of kin at the death of the deceased, not to whom may happen afterwards to be next of kin at the time a question arises upon the grant of administration; for a dead man can have no next of kin; he is not in a capacity to have next of kin at the time he becomes so. Therefore, by the course of office, it is granted to the interest, when the next of kin at the time of the death is not living at the grant of administration *de bonis non*, except in the case of next of kin of the wife and representative of the husband,—then it is granted to the next of kin. Undoubtedly, by the statute, the grant of administration to the next of kin is good; but when the next of kin, who were so at the death of the deceased, are dead, then it is in the heart of the Court to grant it to the next of kin or the interest, and the grant does not depend on the statute, but the rules of the Court,—may grant it to the next of kin,—may grant it to the interest, without regard to the greater or less interest, according to circumstances." The course of office is now to grant administration to the representative of the husband, whether the husband had taken out administration to

* Cited in *Savage v. Blythe*, 2 Hagg. E. R. App. 154; where various cases, elucidating this point of practice, are given.

† 2 Hagg. E. R. App. 165.

the wife or not, unless it is shewn by the representative of the wife that he has a greater interest than the representative of the husband, and it is granted without citing the representatives of the wife. The husband is assumed to have the interest as next of kin of the wife, and no citation of her next of kin is necessary; it is granted as a matter of course. Prior to the case of *Hole v. Dolman*, on the death of the husband, administrator, administration was always granted *primo petenti*—to the next of kin of the wife or to the representative of the husband. Where there are two persons with equal claims, no decree is taken out; it is granted as a matter of course, without citing the other party; but where there is a difference of interest, a decree is taken out, and only then. It is now the course of office always to grant the administration to the person having the interest: the next of kin of the wife is always considered an excepted case, standing alone; the Court, where there is no statutable right, grants the administration to the person having the interest. In *Lovegrove v. Lewis*,* 1772, there was no citation; nor in *Rees v. Cart*,† where a *caveat* had been entered against the grant. In this case, three-fourths of the property being sworn to be that of the executor and residuary legatee, and there being twenty-four persons entitled to the remaining fourth, it would lead to very great inconvenience if it were necessary to take out a decree against all persons having an interest by a party satisfying the Court that he had the great mass of interest. And if a decree were taken out, the Court must, as a matter of course, grant administration to him. It would not be a decree to shew cause, because we are entitled to administration.

JULY 8.
Sowerby, dec.

Administra-
tion granted to
the person hav-
ing the interest.

SIR H. JENNER.—The widow of R. S. took out adminis- JUDGMENT.
tration to her husband, as she was entitled to do, though other persons were next of kin to him, she having a preference over the next of kin. According to the course of office, she was entitled to administration, and consequently was entitled to possess herself, as his administratrix, of the property belonging to him, and to represent A. S., his first wife, through whom the property came to R. S. Her executor

* 2 Hagg. E. R. App. 152.

† *Ibid.* App. 161.

JULY 8.
Sowerby, dec.

Where representative of administratrix of husband applies for administration to the first wife, husband cannot be passed over.

Discretion of Court must be exercised on principle.

Must be a representation of the husband in the first instance.

and residuary legatee, who now prays administration, can be entitled to it only through R. S., and according to practice, he would be entitled, upon the renunciation or citation of the next of kin of R. S., to represent him, and then to take the representation of A. S., the first wife, through him. It appears to me that wherever the representative of the administratrix of the husband applies for administration to the first wife, the husband cannot be passed over; there must be a representation to him *de bonis non*, and having obtained such representation to R. S., who was the party, at the time of the death of the first wife, entitled to the property, you would be entitled to claim the administration. I do not see how (even with reference to the cases) I can pass by the husband, and decree representation to A. S. at once. The other parties (next of kin of R. S.) have an interest, though a very inferior interest, and only through R. S. [*Nicholl*.—Sir Edward Simpson says, it is in the discretion,—in the “heart,”—of the Court, to grant administration, not against the statute.] I cannot without a decree. I admit that there is no statutable right, and that it is in the discretion of the Court; but that discretion must be exercised on some principle, as a part of the practice of the Court. My opinion is, that there should be a representation of the husband in the first instance, and then his representative would be entitled to a grant of administration to the first wife, who was the possessor of the property. My impression is, that these parties are entitled in the first instance.

High Court of Admiralty.

JULY 9.

Salvage. — THE “HOPE.”—*Monition*.—*Protest*.—A monition was taken out in this Court, under the provisions of 3 and 4 Vict. c. 65, on the part of the master, mate, and certain of the crew of the fishing-smack *Speedwell*, against the owner, Edward Field, requiring him to appear in this Court, and bring in the sum of £250 awarded by the Justices of Hull, and paid to Mr. Field, for salvage services effected by the

crew of that vessel to the *Hops*, of Glasgow, in November last, and to abide by the decision of the Court in respect thereto. Mr. Field had since died, and the monition was renewed against his executors, who appeared under protest to the jurisdiction of the Court.

JULY 2.

The Hops.

award, until
magistrates be
first applied to.

Sir J. Dodson, Q. A., in support of the protest. The question is, whether sec. 5 of the stat. 3 and 4 Vict. c. 65, arms this Court with authority to compel parties who have received money for salvage, in all cases, to bring it in, and abide by its decision. The section enacts that, whenever an award is made by justices, in a case of salvage, the parties interested therein may require distribution to be forthwith made; and the persons making the award shall forthwith proceed to the distribution; and if any person shall think himself aggrieved in such distribution, he may, within fourteen days after the award, or payment of the money, take out a monition from this Court, requiring the person in possession of the money to bring in the same, and abide the judgment of the Court in the distribution thereof. The statute, therefore, requires the distribution to be made in the first instance by the persons making the award, namely, in this case, the magistrates. The parties should have applied to them; this Court has not original jurisdiction. The magistrates had all the circumstances of the case before them; if they decide wrongfully, then is the time to appeal to the Court of Admiralty. A party who has not resorted to the magistrates (who never refused to make distribution) has no right to come to this Court.

ARGUMENT.

Provisions of
stat. not com-
plied with.

Nicholl, D., on the same side. No application has been made for distribution to the owner, who has sworn that he has not, at any time, refused to make it.

Addams, D., *contra*. The owner has refused to make due distribution, or why is not the money distributed? The master has sworn that Field had refused to give any answer to his claim; that the money was awarded to him and the crew, but paid to the owner. The object of the statute was to remedy the evil of persons getting salvage-money into their hands, and refusing to make distribution. It says that "it shall be lawful" for the parties to require the magis-

The evil com-
plained of, with-
in the scope of
the stat.

JULY 9.

The Hope.

trates to direct distribution to be made forthwith ; it does not require it to be done, and the omission to do so does not give a party a right to put the money into his own pocket. The protest must be overruled, and the money brought in.

Robertson, D., on the same side. The Act was passed to "improve the practice and *extend* the jurisdiction" of this Court.

JUDGMENT.

Evils intended
to be remedied
by the stat. ;

DR. LUSHINGTON.—In endeavouring to consider the true effect of this Act, there is no better course, in the first instance, than to bring back to recollection the mischiefs it was intended to remedy. They were of this kind. It had happened, in several instances, that money had been received, in consequence either of an award, or of a voluntary payment, by the owners of the vessel or other persons, who retained it, contrary to law and justice ; or, if they did not retain it, argued that they were entitled, in cases in which their own interests were concerned, to constitute themselves their own judges. It was to remedy these evils, and for the purpose of enabling this Court to do that which could not be done before, namely, justice between man and man, and to prevent any individual from being judge in his own cause, that this clause was introduced into the statute.

Now, in this case, no application was made to the magistrates for the purpose of their directing a distribution of the sum they had awarded ; and that the money was not paid according to the award itself, but was paid to the owner of the vessel, instead of the master, to whom, according to the terms of the award, it ought to have been paid. This circumstance does not appear to me to create the least alteration as to the jurisdiction of the Court. If this money has been improperly paid to the owners, instead of to Garrard the master, according to the award, and no receipt has been given by Garrard, it may be that he would have a right to recover it, notwithstanding payment, from the owners of the vessel saved. Prior to the statute, this Court exercised an appellant jurisdiction with respect to the amount of salvage awarded by magistrates or by the Commissioners of the Cinque Ports ; and when the question of amount was brought by way of appeal, annexed to that came the ques-

tion of the distribution of the salvage-money. But, if the decree of the magistrates was acquiesced in by the salvors, then this Court had no power to call up the case for the purpose of making distribution alone. This statute has conferred some additional powers on the Court; the question is, to what extent.

JULY 9.

*The Hope,*and powers
given thereby.

The 5th section enacts, "that it shall be lawful for any person interested in the distribution of the amount awarded or paid, to require distribution to be forthwith made thereof; and the person or persons by whom such amount shall be awarded, or, in the case of voluntary payment, the person by whom the same shall have been received, shall forthwith proceed to the distribution thereof." Now, two questions arise; first, whether the words "it shall be lawful" render it absolutely compulsory on parties, who seek to avail themselves of the statute, to require distribution to be made by the magistrates; or whether, supposing that should not be the necessary construction of these words, yet, looking at the whole of the statute, the making such application to the magistrates is not in the nature of a condition precedent. When this application has been made, it is the duty of the magistrates to require distribution to be made forthwith; and it is clear that that application, if made at all, must be made within a less period than fourteen days; because, unless so done, it would be impossible for them to order any distribution so as to bring the case within the fourteen days which would allow of an appeal to this Court. A limitation of time was absolutely necessary; because, otherwise, the state of things might have gone on for an indefinite period. But the question is now, whether I can enforce this monition, and proceed to the distribution of the sum awarded, according to my own judgment—that is, take into consideration the whole of the circumstances, which are not before the Court; or whether it was not requisite that the judgment of the magistrates should first be had. I am of opinion that it is necessary, under this statute, first, to have recourse to the magistrates, and that this statute cannot be carried into effect otherwise. It appears to me to have been the intention of the Legislature, that whoever required dis-

Requirements
of the stat.Application
to the magis-
trates a condi-
tion precedent.

JULY 9.
The Hope.

tribution to be made, where there had been an award, was bound to apply within fourteen days, and so much within as to allow of time for an appeal to this Court; that the magistrates, who knew the circumstances, were first to exercise their judgment thereupon, and direct distribution as they might think fit. The magistrates are then directed to cause that distribution to be certified under their hands and seals, and an account to be annexed to the award; and it is quite clear that if, after this has been done, and not before, any person interested in that award, and in the distribution, was dissatisfied, then he had a right to come before this Court, and have its opinion upon the distribution. In the first place, he would have a right to complain that, having applied to the magistrates to cause distribution, it had not been made according to the award; and, secondly, he had a right to come under the terms, "or otherwise," if the magistrates had directed an unjust distribution.

This, in my opinion, is the construction of the statute. It is not necessary to follow it up further as to a case where payment has been voluntarily made without any proceedings before magistrates; but I have only to decide, that I have no original jurisdiction as to the distribution of salvage awarded by magistrates; and, considering that the terms of this Act have not been complied with, I am of opinion that I must pronounce for the protest, and decline to carry the monition into execution.

This Court has no original jurisdiction.

Protest sustained.

JULY 13.

Bottomry.—
Costs of Registrar's Report given to the bondholder.

THE "HEART OF OAK."—*Motion*.—A bottomry-bond was, on the 24th March last,* pronounced valid in part and invalid as to the rest, and it was referred to the Registrar and merchants to report on certain items.

The Report being now made, a question was raised as to which party should pay the costs of the Report. The Proctor for the bondholder claimed the costs, as the Report was in favour of the whole sum. The Proctor for the present owners alleged that they had been compelled to go before

* 10 *Monthly Law Mag.*, 260.

the Registrar, as the Court had pronounced against some and for other items.

JULY 18.

Heart of Oak.

DR. LUSHINGTON.—In this case, the proceedings were against the vessel, and if you purchased the vessel, you took it with all its responsibilities, and your remedy is against the original vendor. The costs of the Report must be allowed.

JUDGMENT.

THE "WILSONS."—*Motion.*—The vessel in this case was bound from Italy to St. Petersburg, but wanting repairs at Portsmouth, the master, being without funds or credit, advertised for an advance of £300 upon bottomry. No offer was made, but ultimately Messrs. G. and G., of that place, consented to advance £264 on a bottomry-bond, bearing maritime interest at 13 per cent. The bond contained a proviso, that, should the brig miscarry or be lost, the money advanced would not be demandable. The brig left Portsmouth on the 28th April, but on the 6th May, she was driven by stress of weather upon the Long Sand, between Kent and Essex, whence she was got off by H. M.'s ship *Boxer*, and taken to Ramsgate. Salvage was awarded for the service by this Court, and, under its decree, the vessel was sold for £1,660. The sum of £1,370 was paid into the Registry on the 25th May, as the net proceeds.

Bottomry.—Proceeds of vessel hypothecated, sold under decree of Court in a cause of salvage, allowed to be arrested in the Registry, at peril of bondholder.

Addams, D., now moved for a warrant to arrest the proceeds. The miscarriage, which was to forfeit the money advanced under the bond, must be total. Here the voyage was only intercepted. Whether any part of the maritime interest be payable, is another question.

ARGUMENT.

DR. LUSHINGTON.—I shall allow the proceeds to be arrested, but at your peril, and if it should appear that I have not (as I think I have not) jurisdiction, you will be condemned in the costs.

JUDGMENT.

JULY 21.

THE "DYGDEN."—*Act on Petition.*—The *Dydden*, a foreign barque, of 420 tons, drawing fifteen feet of water, sailed from Norway 2nd of February, with a cargo of timber.

Salvage.—Claims of salvors (fishermen) pro-

JULY 21.*The Dygden.*

nounced against, for erroneous and improper conduct. — Persons who assume the character of salvors, when more competent persons are at hand, are entitled to no indulgence.

ber, for Gibraltar. On the 4th, having approached the English coast, the master mistook the Winterton Light for that on the North Foreland, and was observed from Cromer proceeding along the Norfolk coast, in evident ignorance of the locality, towards the dangerous shoals in the way to the Lynn Deep. The wind was from the E., and the sea ran high. The vessel had a signal flying, alleged by the master to be for a pilot, but understood on shore to be for assistance. The *Augusta*, Sherringham life-boat, with twenty-two fishermen, put off to the barque, and, their services being accepted, they conveyed her from Blakeney Bay to Wells Bay, intending to carry her thence to Holkham Bay, where there was good anchorage. Here the vessel twice parted from her cables, and they ran for Brancaster Bay; but proceeding through a narrow channel, between the Bridgirdle Sand and Burnham Flats, she got upon the tail of the former; she afterwards floated off, and (the crew having left her) drifted on shore on the Brancaster coast. The owners of the *Dygden* resisted the claim for salvage, on the ground that the pretended salvors had, in reality, saved nothing, but had subjected the owners to loss; that it was not a case of merit, but of great demerit, since the proper course was not to have taken the vessel into Wells or Holkham Bay, but to have anchored in Blakeney Bay, where she was, or to have stood off and on till the tide served to have taken her to the north, or across the Blakeney Overfalls, by the Dudgeon, to the Spurn Light, and anchored in Hawk Road, at the entrance of the Humber. The value of the property was £1,100. The Court was assisted by Trinity masters,* the question turning solely on nautical points.

Addams, D., and *Curteis*, D., for the salvors; *Sir J. Dodson*, Q. A., and *Bayford*, D., for the foreign owners.

SUMMING UP.

Salvors, not possessed of adequate knowledge, have a claim to indulgence only where more ef-

ficient assistance is required, and there are no other individuals on the spot capable of rendering more efficient assistance, this Court must look with considerable indulgence at their efforts; because, being the only aid that can be procured, and offer-

* Capt. Locke and Capt. Fitzroy.

ed in a state of great exigency, every allowance must be made if they are not possessed of adequate knowledge to perform the duty they had undertaken. But different considerations will apply to the conduct of individuals who assume the character of salvors, when there are persons competent to discharge those duties. In this case, if the present salvors had declined to undertake the task, there was an opportunity for other individuals to have gone from the shore, who would have stood in the place of these persons, and some of whom must be esteemed competent persons, because they were pilots, whose particular office it was to conduct ships on that coast. In ordinary cases, all that you can expect from persons attempting to perform the duties of salvors is, the possession of ordinary skill and ability. Of course, we could not expect from Sherringham fishermen the same nautical skill that we expect from pilots, whose sole occupation it is to navigate vessels.

JULY 21.

The Dygden.

ficient persons
are not on the
spot.

In this case,
pilots at hand.

The foreign vessel had suffered no damage from storms, or mischief of any description; no loss of sails or anchors; but they were ignorant of the locality, and were proceeding in a course which might have led them into danger, had they not resorted to the advice of persons acquainted with the coast. Taking the averments on the one side and on the other—the salvors asserting that they pursued the course which, under the circumstances, was best calculated to insure the safety of the vessel; the owners averring that the conduct of the salvors was unseamanlike, improper, and calculated to cause the loss of the barque, and evinced a complete ignorance of the shoals and soundings of that part of the coast, and of the proper course and mode of navigation, the Bridgirdle Sand being the most dangerous of the shoals;—these being the averments, the questions I put are these: Whether what the boatmen did, under all the circumstances of the wind, the weather, the size of the ship, the dangerous shoals by which it was surrounded, was a proper, judicious, and seamanlike course? whether a better and safer course would not have been practicable, remembering the state of the wind, the weather, and the tide? In short, whether these fishermen conducted themselves with that ordinary degree of nautical

The vessel
had suffered no
damage.

Questions.

JULY 21. skill to be expected from every man who voluntarily under-
The Dygden. takes the charge of a vessel so placed; I say, "ordinary skill," for that we have a right to require of them, they having assumed the duties of pilots when there were pilots ready to perform them.

OPINION. **THE TRINITY MASTERS.**—We are decidedly of opinion, that the fishermen who went out in the Sherringham boat took the most erroneous steps from the beginning to the end of the proceedings. Instead of taking the barque to sea, after the tide flowed, so as to enable her safely to cross the Blakeney Overfalls, they run her to leeward in a most dangerous place.

JUDGMENT. **DR. LUSHINGTON.**—Under these circumstances, I must necessarily pronounce against the claim for salvage. The
 Claim pro- nounced against. only point that remains is the question of costs; and I entertain considerable doubt whether it is not my duty to condemn the fishermen in the costs of this suit, because I
 Misconduct of fishermen. feel the strongest conviction of their misconduct. But, at the same time, I will give them the benefit of any doubt; and it may be, that the course they pursued was honestly pursued, and may have arisen entirely from ignorance or a misunderstanding of the measures that ought to have been adopted; and, looking at the difficulties, I think, upon the whole, I am not bound to follow the sentence up by a condemnation in costs. The punishment of paying their own costs will, I hope, induce them to be more cautious in future.

Possession. **THE "WINDSOR CASTLE."**—*Act on Petition.*—This was
 —A master of a vessel cannot in such a cause dispute the title of the owner. a suit on the part of Messrs. Johnson and Co., alleging themselves to be sole owners of the *Windsor Castle*, to displace the master (Manuel), who had given an appearance, and an Act on Petition had been entered into, supported by affidavits. It appeared that the vessel, on the 22nd October last, in going down the river, on a voyage to Australia, met with an accident, and whilst detained for repairs, the original owner, Burton, having transferred the property of the vessel, by bill of sale, to Johnson and Co., became bank-

rupt. The validity of the transfer was, however, a matter of litigation between them and the assignees of the bankrupt. The sale took place on the 6th November, twenty-three days before Burton's name appeared in the *Gazette* (the 29th). On the 20th, Johnson and Co. obtained from the master the documents relating to the ship, and on the 10th December, they appointed another master; but Manuel, not having been released from his liabilities to shippers and others, and not having received payment of moneys due to him, refused to give up the ship. He now stated in his Act and affidavits facts to shew that Johnson and Co. were not *bonâ fide* owners of the ship; that the transfer from Burton was only colourable; that certain proceedings took place between them and the original assignees of Burton, which had been brought under the cognizance of the Court of Review; that the assignees originally appointed (who had colluded with Johnson and Co.) had been removed, and new assignees substituted; that Johnson and Co. had agreed to give up the vessel, and that, if time were allowed for the newly appointed assignees to come before the Court and assert their rights, they could establish their title as owners.

JULY 21.

Windsor Castle.

Addams, D., for the master. Johnson and Co. were not the owners of the vessel: it is sworn that they had given up their title to the assignees of the bankrupt; and even if they have not, it is a question whether they could dispossess the master without an indemnity. There is no case of a cause of possession between an owner and a master who does not set up an ownership.

ARGUMENT.

Johnson & Co.
not owners.They cannot
dispossess master
without indemnity.

Nicholl, D., for Johnson and Co. We are the registered owners; it is sworn that we are the owners of the ship. The vessel is arrested; the warrant is notice to all concerned, and there is nobody before the Court to controvert our title. The master acted under the directions of Johnson and Co. as owners. On what principle can a master dispute the title of the owner? He is the servant of the owner, and has no *lien* on the ship, and cannot retain it against the assignees of a bankrupt owner. *Wilkins v. Carmichael*.* All

Johnson & Co.
are the registered
owners: nobody before
the Court to
controvert their
title.Master has
no *lien*.

* Doug. 101. Abbott, *Shipp.* p. II. c. 3.

JULY 21. we want is power to sell the ship for the benefit of all parties: we are ready to bring the proceeds into the Registry.

JUDGMENT.

DR. LUSHINGTON.—It is a matter of ordinary course in this Court, in causes of possession, where the sole owners of a vessel, or the majority of persons who have a right or title, join in the suit, to displace the master who may have possession, and restore her to the owners: where questions have arisen of great difficulty as to complicated title, the Court has declined to interfere. In this case, the new assignees have not come before the Court: and when the case was before it on a former occasion, I suggested, that if they intended to dispute the validity of the transfer, it was their duty to come here and assert their right and title. If they had come, and had made out either that the title of Johnson and Co. was so doubtful, that the Court ought to hesitate before it acted upon it, or that the title was clearly in the original bankrupt, the Court would have held its hand. But no persons holding that character have come and made any representations at all; therefore, the sole question I have to consider, on this part of the case, is, whether it is competent to the master to appear and allege a title in some one else. I am clearly of opinion that this can never be permitted in a cause of possession. The only extent to which a master can allege the title to be in another person, is where it is done for the purpose of inducing the Court to give further time for the appearance of the assignee of the sole owner: the Court would allow a master or other person to make such an application, and would grant further time if necessary. But I am asked, taking the facts to be true, to make a decree in favour of the master. I could not, however, make such a decree, if the facts were proved. I apprehend it to be a clear principle of law, that where a master undertakes the charge of a vessel, he does so upon the sole responsibility of the owner. He cannot have any *lien* on the vessel; whatever may happen of good or evil to the person who appointed him, or his successors, he could not enforce any *lien* against the vessel.

The new assignees not before the Court.

Master cannot, in a cause of possession, allege an adverse title.

A master undertakes charge of a vessel on responsibility of owner.

He has no *lien*.

I have no hesitation in saying that the Court must direct the ship to be delivered up to Messrs. Johnson and Co., as the owners.

Nicholl asked for the costs, which the Court refused.

JULY 21.

Windsor Castle.

Vessel must be delivered up to Johnson & Co. Costs.

Consistory Court of London.

JULY 22.

BREALY, FALSELY CALLED REED, v. REED.—Cause.—Nullity of marriage, by reason of undue publication of banns, on evidence of knowledge by both parties, pronounced for.—Effect of subsequent declarations.

This was a suit of nullity of marriage by reason of the undue publication of banns, by Elizabeth Brealy against Robert Charles Reed. The Libel pleaded the stat. 4 Geo. 4, c. 76, and that R. C. Reed was the son of a merchant and shipowner of St. Nicholas, Bristol, and was baptized in that parish by the names of Robert Charles, as appeared from a copy of the original entry in the register; that Elizabeth Brealy, spinster, in 1827 and 1828, resided with her mother in the house or cottage of John Scott, a carpenter, second husband of her mother (both since deceased), at Bedminster, Somerset; that Robert Charles Reed was brought up to the sea, was entirely dependent for his maintenance upon his father, with whom, in 1827 and 1828, he resided; that he was at all times called and known by the name of "Charles" or "Charley" Reed, and not by the name of "Robert," which was entirely dormant and disused; that in 1827 and 1828, he paid his courtship to Elizabeth Brealy, then aged 17, with the knowledge and consent of her mother and her mother's husband, but without the knowledge of his own father; that Elizabeth Brealy accepted his addresses, and agreed to be married to him; that he represented that his marriage would be highly displeasing to his father, and for the purpose of effecting the marriage clandestinely, and of concealing it from the knowledge of his father, it was concerted and arranged between Robert Charles Reed, Elizabeth Brealy, John Scott, and Jane Scott, that the banns should be published in the name of "Robert" Reed only, and that the name of "Charles," by

JULY 22.

Brealy v. Reed.

which he was commonly known, should be suppressed, and that a publication of banns, with the false name, should be made, not in the parish of St. Nicholas, where R. C. Reed resided, but in that of Bedminster; and in order to deceive the clergyman who solemnized the marriage, and prevent his demanding a certificate that the banns had been asked in the parish where R. C. Reed dwelt, it was further concerted and arranged that, in the notice for the publication of banns at Bedminster, it should be falsely stated that both the parties dwelt in that parish, and they were so described in the banns thrice published in the parish church of Bedminster in February, 1828, wherein Robert Charles Reed was designated as "Robert" Reed, and that the name of "Charles" was, in the publication of the banns, knowingly and wilfully suppressed or omitted by the parties, jointly and severally, for the purpose of deception and concealment, and with the intent to effect a clandestine celebration of their marriage; that, in pursuance of the banns so unduly and illegally published, a pretended marriage was, on the 18th February, 1828, in fact, solemnized in the parish church of Bedminster between the parties, as "Robert Reed" and "Elizabeth Brealy," an entry whereof was made in the Register Book; and that the parties having thus knowingly and wilfully intermarried without due publication of banns, and without license, such pretended marriage is absolutely null and void; that the parties after the marriage cohabited together as husband and wife; that, subsequently to their marriage, they frequently, in each other's presence, declared that the banns were published in the name of "Robert" only, to prevent the father of R. C. Reed hearing of the marriage; that, in 1832, differences arose between the parties, and they ceased to live together, and in 1834, R. C. Reed intermarried with Lucy Butt. No plea was given on the part of the husband, nor were any interrogatories put to the witnesses on his behalf, and the case was undefended.

July 10.
ARGUMENT.

Jenner, D. Of the marriage, and of all the principal facts, there is ample proof. The husband was twenty-seven at the time of the marriage; the wife seventeen. There can

be no doubt that his name was Robert Charles, but if he was always known by the name of Charles, it is no matter what his baptismal names were. *Wilson v. Brockley*.^{*} *Wyatt v. Henry*.[†] The only question is, whether both parties knew the name concealed, and concealed it knowingly and wilfully. It was the object of both the parties to suppress the name of "Charles," in order to keep the marriage from the knowledge of the relations of Mr. Reed. [PER CURIAM. What evidence is there, that before the marriage Mrs. Reed was cognizant of the fact?] There is the evidence of the clergyman (as in the case of *Tongue v. Allen*‡), that it was his practice to ask parties as to their names being correctly entered, and the evidence of Harriett Morgan, the half-sister of the wife, distinctly proves that the omission of the name was concerted by both parties for the purpose of concealing the marriage.

DR. LUSHINGTON.—There are certain facts in this case which are clearly proved, namely, 1st. the marriage itself; 2ndly. the publication of the banns; 3rdly. that the husband was most usually called and known by the name of "Charles," and never by that of "Robert;" 4thly. that the marriage was a clandestine one, for the purpose of concealing it from the knowledge of the husband's father, who was in circumstances far superior to those of the wife's family. The last and by far the most important requisite is, that the undue publication shall have taken place knowingly and wilfully as relates to both the parties to the marriage. I apprehend it is now settled that this is what the law requires; and as the Court has reason to believe that a sentence of nullity is desired by both parties, it has a grave duty to perform, in examining the evidence, to be satisfied as to the proof on this point.

The most important witness to this fact is Mrs. Morgan, the half-sister of Elizabeth Brealy, and it is calculated to alarm the jealousy of the Court to find that she deposes to facts which occurred thirteen years ago, when she was only fourteen years of age, and it is certainly somewhat suspi-

^{*} 1 Phill. 147.

[†] 2 Hagg. C. R. 220.

[‡] 1 Curt. 38.

[§] *Tongue v. Allen*, 1 Moore, P. C. Rep. 90.

JULY 22.

Brealy v. Reed.

All facts
clearly proved,
save knowledge
in both parties.

JULY 22.

Brealy v. Reed.

cious that, being so young, her memory, after so great a lapse of time, should be so retentive of the species of facts to which she has deposed, as to enable her to recollect precisely what occurred. She says: "On several occasions before the marriage took place, Mr. Reed, in the presence of my sister and my father and mother, talked over with them the matter, as to the best way of having it done, to prevent its coming to his father's ears. I well remember that Mr. Reed said that, if the banns were put up in his name of 'Robert' only, he should not be known. I well remember that my sister had always called him 'Charles' up to that time. I also remember that when Mr. Reed urged my father to put up the banns in the name of 'Robert' only, my father, who was a straightforward man, made some objections, but my mother being very anxious to have my sister married, my father was prevailed upon to put the banns up in the manner as proposed by Mr. Reed. My sister was present and privy to all the conversations which took place between Mr. Reed and my father and mother about getting the banns put up. I myself have heard Mr. Reed ask my father and mother to have the banns put up in his (Reed's) name of 'Robert' only; my sister was present at the time; she knew that the banns were to be so put up in order to prevent the intended marriage coming to the ears of Mr. Reed's father." Now, supposing the whole of this witness's evidence to be deserving of credit, the effect will be, that we have both the parties affected with the guilty knowledge. But I confess the very strength of this evidence goes a great way not only to excite a suspicion in my mind, but to make me doubt its veracity.

Affecting both
with the guilty
knowledge.

The other witness to this fact is Mrs. Chettle, a marks-woman, who deposes to a conversation which took place thirteen years before, at which Mr. Reed was not present. She says that Mrs. Scott, on one occasion, observed that it was an improper thing for her daughter (who was present) to marry a man in the name of "Robert," when his name was "Charles," and that such a marriage would not stand. "My mother," the witness adds, "I well recollect, said that, if Elizabeth Brealy was a child of hers, she would not

allow her to marry so. I also remember that Elizabeth Brealy jumped up from her chair, and in an angry manner said, that she was determined to have Charles Reed, and that it did not signify if he was married by the name of 'Robert,' because he had promised at some future time to marry her in his own name. Charles Reed was not present when this conversation took place, neither was John Scott present; but I recollect that it was said by Elizabeth Brealy, that they should be obliged to be married so, namely, Charles Reed by the name of 'Robert,' in order that his father might not hear of it." This evidence, which is not very consistent with that of Mrs. Morgan, applies simply, but in a very stringent manner, to Elizabeth Brealy, making her a principal party in the transaction.

JULY 22.

Brealy v. Reed.

Then the case comes to this; that the whole evidence as to the publication of the banns, with the omission of the name of "Charles," with the knowledge and consent of both of the parties, rests upon the testimony of one witness, a girl of fourteen years of age at the time.

Weakness of the evidence.

If it stood only so, I confess I should entertain the greatest doubt as to the sentence I ought to pronounce, because I must not forget that, in trying a case of this description, I should not look simply to the circumstances of the individuals in the cause, but also bear in mind, that the rights of children may be involved, and that the decree of the Court may determine that they are in a state of illegitimacy. It is, therefore, highly incumbent upon the Court, in such cases, especially where there is reason to suspect that both parties are desirous to have the marriage annulled, to examine with great care and accuracy the whole of the facts.

Both parties desire to annul the marriage.

There are, in addition to what I have stated, certain declarations of Elizabeth Brealy pleaded and deposed to, that Mr. Reed was married to her in the name of "Robert" only, in order to keep the marriage a secret from his relations; and there is a declaration from Mr. Reed, in the presence of his wife, that they had been so married in order that his father might not know of it. I place very little confidence in subsequent declarations, and I think grave doubts may be entertained whether such subsequent declarations,

Declarations.

JULY 22. in a case of this kind, made long after the marriage, are ad-

Brealy v. Reed.

Doubtful if
declarations of
the parties sub-
sequent to the
marriage, af-
fecting other
parties, admis-
sible as evi-
dence.

Evidence of
clergyman;

an important
bearing on the
question.

Knowledge
brought home
to both parties.

Sentence of
nullity.

missible as evidence; because, in these cases, one party or the other might by admissions affect the *status* of other parties, by reason that the interests of the parties in the cause are not confined to themselves, but extend to their children and to the public. The declaration of the wife may by possibility be evidence against the husband, and *vice versa*; but where it affects the children, I doubt whether such declarations could be received.

But there is another and a most important part of the case, as relates to the publication of the banns; I mean the evidence of the clergyman, which satisfies my mind that the marriage was solemnized with the omission of the name of "Charles," and there is equally clear evidence to shew that the banns were put up with that omission. I think these facts have an important bearing upon the question, whether there was a guilty knowledge of the omission of the name; so important, that, although I do not credit the whole of the evidence of the two witnesses, Morgan and Chettle, yet, under all the circumstances of the case,—the clandestinity of the marriage being proved, the constant use of the name of "Charles" being proved, and all the other facts,—taking the whole of the case together, it seems to me difficult to come to any other conclusion that can be justified by the evidence, than that the omission of the name of "Charles," wilfully and knowingly, is sufficiently brought home to both parties, and I therefore may pronounce a sentence of nullity of marriage.

Prerogative Court of Canterbury.

JULY 23.

Will of a pau-
per, attended
with suspicious
circumstances
(propounded
and opposed by
parties suing in

NOBBS v. NOBBS.—Cause.—This was a question as to the validity of a paper propounded as the will of James Nobbs, who died in 1833. The paper purported to bear date on the 7th October, 1832, and to have been executed in the presence of three witnesses. The deceased was a pauper, an

inmate of Shoreditch workhouse. He was married, but lived separate and apart from his wife. Being considered to have a title to certain leasehold and copyhold property, he was advised by Mr. John Wright, secretary to an association formed for the purpose of enabling poor persons to obtain property to which they were entitled, to make a will, which he consented to do, thereby bequeathing the whole to his brother, Wm. Nobbs, to the exclusion of the widow. From the evidence of Mr. Wright and the other witnesses, it appeared that the deceased was asked by Mr. Wright whether he would leave his wife any thing, and he said he would not, as she was living with another person; that the will was executed on a Sunday, at the house of the brother, whom the deceased was visiting. The parties to this suit (the brother and the widow of the deceased) were both paupers.

Pratt, D., for the widow, in opposition to the will; *Jenner, D.*, for the universal legatee, in support of the will.

SIR H. JENNER.—The appearance of the paper (which was drawn up by Mr. Wright) is calculated in some degree to excite the jealousy of the Court, for it is not executed as such papers usually are—the deceased's name is not opposite to the seal (where, indeed, there is not room for it), and the name of one witness is above the seal and the names of the two other witnesses are below it—and the ink in which the name and date are written is of a very different description from that in which the body of the will is written. This is a circumstance calculated to raise a suspicion that it is not a *bonâ fide* transaction. But, according to the testimony of Mr. Wright, the will was executed on a Sunday, and, there being no ink in the house, and none readily procurable, the will was signed and dated with a solution of copperas, used in the business of Wm. Nobbs, who is a shoemaker. The account given by the two other witnesses could by no means have satisfied the Court of its truth, for one of them was only sixteen at the time. This witness says that the deceased, who was in a weak state of health, came to dine with his brother on the day when the will was executed; but Mr. Wright says he did not dine there; so that

JULY 23.
Nobbs v. Nobbs.
formd paupers), pronounced for.

Evidence.

Suspicious circumstances.

Variation of colour of ink;

accounted for.

The evidence;

contradictory on one point.

JULY 23. here is a contradiction. But, considering that nine years
Nobbs v. Nobbs. elapsed between the execution and the deposition, it is not
 likely that the witnesses should be very accurate in their re-
 Lapse of time. collection. The father of this witness also deposes to the
 execution of the will ; but Mr. Wright is the principal person
 upon whom the Court must rely for the establishment of the
 paper ; and unless he can be contradicted by other witnesses,
 or shewn to be a person not entitled to credit, the Court
 cannot come to the conclusion that this will was not executed
 by the deceased. He states that he recommended the de-
 ceased to make a will in his brother's favour, in order that
 he might claim whatever property the deceased might be
 entitled to, and that the deceased did not wish his wife to
 Ground for have one fraction. As the deceased said she was living with
 excluding the another person, there was ground enough for her exclusion.
 widow. The will was explained to the deceased ; therefore, if Wright
 is to be believed, he knew the contents of the paper, and
 Capacity ad- his capacity is admitted. The circumstance of his being
 mitted. described as of " Angel Street, St. Martin's Le Grand,"
 which was his brother's residence, is not one that should ex-
 cite suspicion in the mind of the Court.

Under all the circumstances, although, in the first in-
 stance, the case raised a considerable degree of jealousy and
 suspicion, I think there is not ground to reject the testimony
 of Mr. Wright, who seems, from all appearance, to be a
 respectable person, and if his testimony is to be relied on,
 Will suffi- the will is sufficiently proved. I pronounce in its favour,
 ciently proved. and decree probate to Wm. Nobbs, the executor named
 in it.

AUGUST 3.

Legacy omitted by mistake of the drawer of the will.— IN THE GOODS OF JOSEPH WILSON, DEC. — *Motion.* —
 The testator died on the 5th February, 1841. On the 20th
 January, he gave instructions to his solicitor to prepare a
 Court not at will for him, which was executed on that day. After exe-
 cution, it was discovered that a small legacy (£20), which
 he intended to leave to E. M., had been omitted ; and he
 directed his solicitor to prepare a codicil to supply this
 Legacy omitted by mistake of the drawer of the will.—
 Court not at liberty to supply the omission.

mission. The solicitor suggested that it would be better to make a new will. A new will was accordingly prepared and executed on the 21st January, revoking the will of the preceding day. On the 4th February, the day before his death, the deceased was desirous of bequeathing £300 to W. B., and £250 to J. R., to be charged on his freehold estate, and directed a codicil to be prepared for that purpose, and he attempted to execute it, but failed through weakness. On the 5th, a new will was prepared and executed; but the person who drew this will took for his guide the will of the 20th January, instead of that of the 21st, and consequently omitted the legacy of £20 to E. M., though he inserted the bequests of £300 and £250 charged on the freehold estate.

Aug. 3.

Wilson, dec.

Addams, D., in support of the motion for probate of both *Motion.*
papers—of the 21st January and 5th February.

SIR H. JENNER.—The question is, how the Court is to *JUDGMENT.*
supply this defect. In the first place, it is extremely difficult to say that the two papers can be pronounced for on motion—that is, that I can pronounce for the effect of a paper which has been revoked: for this paper of the 5th February expressly revokes all former testamentary dispositions. Can the Court insert a legacy in a will? I think I am not in a situation to supply the defect. I must reject the motion. *Paper of Jan. 21st revoked. Motion rejected.*

WILLIAMS, BY HIS GUARDIAN, v. WILLIAMS AND OTHERS.—*Motion.*—Mr. John Williams, a solicitor at Shrewsbury, died on the 6th March, 1841, leaving a widow and five minor children, the only parties entitled in distribution of the personal estate, in case of intestacy. In February, 1832, he had an apoplectic attack, which totally incapacitated him from transacting any matter of business. On the 12th July, 1833, he was incautiously suffered to execute a will, making an equitable disposition of his property amongst his wife and children, but to the prejudice of his eldest son, and nominating his wife one of the executors. In the beginning of 1840, a Commission of Lunacy issued, and on

A will executed by a person in a state of utter incapacity, not pronounced. —
Motion for administration as in an intestacy, refused in the absence of full explanation by attesting witnesses.

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Williams.*

the 18th March, the jury found that the deceased was of sound mind, and had been so, without lucid interval, from February, 1832, the date of the attack. The property consisted of a real estate of £700 a year (subject to a mortgage of £7,750), and personalty of the value of £8,000. All the family were of opinion that the will was not entitled to probate, and none would come forward to propound it.

MOTION.

Addams, D., on affidavits, moved the Court to pronounce, under the circumstances, that the paper was not entitled to probate, and to decree letters of administration, as in a case of intestacy, to the widow.

JUDGMENT.

SIR H. JENNER.—The two medical attendants and the nurse swear that the deceased was utterly incapable; that at first, after his attack, he was wholly unconscious; but afterwards he became able to recognize objects and persons to some extent; though he was childish, imbecile, and totally unable to transact any matter of business. The evi-

Evidence of
incapacity in
affidavits;

dence of his incapacity is most satisfactory; on the face of these affidavits, the Court could have no doubt that the deceased was incapable of executing a will disposing of real and personal property. But when I have before me a will consisting of seven sheets of paper, each of them signed by

but will attest-
ed by three wit-
nesses;

the deceased in a proper manner, and attested by three witnesses—one of them a solicitor—I cannot understand how these affidavits can be correct. If the deceased was reduced to such a weak, imbecile, and childish state, can I suppose

one of them an
attorney.

that Mr. Richard Griffiths, of Welchpool, would attest the will of such a person? There is no affidavit from Mr. Griffiths; but there are affidavits from the two surgeons and the nurse. I cannot upon this evidence pronounce against the will, and defeat the interest of the younger minor chil-

Further evi-
dence neces-
sary.

dren. I must have some further evidence before I can declare that this is not the will of the deceased. It is true, the widow and the children decline to propound the paper; but I cannot dispose of the interest of minor children because

Motion re-
jected.

the widow does not think proper to propound it. I reject the motion.

Dec. 6.
Motion re-
newed.

(This motion was renewed in Michaelmas Term, upon further affidavits, including one from Miss T., one of the

attesting witnesses, and from the widow ; but two of the attesting witnesses (including Mr. Griffiths) refusing to make an affidavit, the Court again rejected the motion, observing that the statement of the two gentlemen, who attested the execution of the will, might differ from that of the other witness, and, " if they will not make an affidavit, the Court can only say, the parties must propound the paper, and compel them to give evidence.")

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Two attesting witnesses refuse to make affidavit.

Paper must be propounded.

WALKER v. WALKER AND OTHERS.—Motion.—The deceased, Wm. Walker, died 3rd April, 1841, leaving a widow and three children by a former wife, and one by his relict, the only parties entitled in distribution. He made a will on the 6th September, 1834, whereby he appointed T. W. and W. B. executors and residuary legatees in trust for the benefit of his children by his first marriage, who were still minors. In July, 1837, three years after the date of the will, he married his second wife, by whom he had one child.

Marriage and birth of issue operated to an absolute revocation of a will, prior to the late statute.

Sir John Dodson, Q. A. The second marriage and birth of issue being subsequent to the date of the will, it is revoked thereby. I move, therefore, that letters of administration be granted to the widow, as the deceased is dead intestate. In *Israel v. Rodon*,* the Judicial Committee of the Privy Council held it to be a rule of law, that marriage and the birth of a child operated not as a mere presumptive revocation of a prior will, but as an absolute revocation, even before the late statute.

ARGUMENT.

SIR H. JENNER decreed administration, after affidavit of service on the minors in the presence of persons capable of advising them.

JUDGMENT.

IN THE GOODS OF FRANCIS LAMBERT, DEC.—Motion. Part of a —The deceased, a goldsmith in Coventry Street, died 2nd February, 1841, leaving a considerable personal estate. In

draft will (executed by way of precaution) cut away, without evidence as to date when done

* See 7 *Monthly Law Mag.*, 179, where an accurate report of their Lordships' judgment is given.

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Lambert, dec.

—held to be a revocation *pro tanto*, whether done before or after the Act.

1835, a solicitor received instructions to prepare a will for him, and from these instructions he made a draft, and afterwards another draft, and in March 1836, a fair copy of this draft (filling nineteen sheets of paper) was left with the testator for his approval. In August, 1836, he produced this draft will, which he had signed, to two clerks in his office, and informed them it was his will, requesting them to attest it, which they did. In July, 1837, the deceased, having made certain alterations, had them likewise attested. The solicitor never received back the draft will, but the deceased spoke of intending to return it, telling him that he had signed it, by way of precaution, lest he should die before he had executed a regular will. After his death, the draft will was found in a box, executed, but certain parts of the first sheet were cut away, and the latter part of the sheet was annexed to the top of it by a wafer. There was no evidence when this was done.

ARGUMENT.

Addams, D., submitted that the presumption was, that it had been done before the 1st January, 1838; but the legacies were unimportant.

JUDGMENT.

No doubt of testator's intention to revoke.

Probate without the words removed.

SIR H. JENNER.—The passages must have been cut out after July, 1837; but it is immaterial whether it was done before or after the 1st January, 1838, for, under the 20th section of the Act, a will may be revoked in part, as well as in the whole, by burning, tearing, or otherwise destroying, with intention to revoke. There can be no doubt that the testator intended to revoke the part removed, and that it was his own act; the paper is, therefore, revoked *pro tanto*, and good for the other parts. I am of opinion, that probate should pass without the words in the first sheet removed by the deceased himself.

Practice. — A creditor, *qua* creditor, not allowed to oppose a grant of probate of a will to the executor accord-

MENZIES v. PULBROOK AND KER.—*Act on Petition.*—The deceased, Mr. James John Fraser, of Edinburgh, writer to the signet, a native of Scotland, died by his own hand, in London (where he had been resident, on business for about a year), 3rd June, 1839. He was a bachelor, leaving a sister, Jane F., spinster, and other relations. On

the 14th September, 1833, he executed a will, whereby he appointed his sister executrix. By a codicil, dated 2nd July, 1834, he named Mr. James Menzies joint executor; but by a further codicil, 21st April, 1836, he re-appointed his sister sole executrix and universal legatee. The deceased had been of unsound mind during the month previous to his death. His estate was insolvent, and on the 3rd July, a meeting of his creditors took place at Edinburgh, when certain proceedings were adopted (the sister having renounced probate of the will and codicils) to enable Mr. Alexander Millar to qualify himself as "executor creditor," to take administration of the estate, with the will and codicils annexed, in the Court of Scotland, with the consent of all the creditors, including Mr. Menzies, then present. Mr. Millar was accordingly appointed by the Commissary Court of Edinburgh "executor dative *qua* creditor" of the estate of the deceased. In Michaelmas Term, 1839, Mr. Millar applied to this Court for letters of administration, with will and codicils annexed, which was opposed by Mr. Menzies, in the character of creditor, who prayed that the administration might be granted to him. An Act on Petition, on behalf of Mr. Millar, was delivered to the Proctor for Mr. Menzies, who did not write to it, and the Petition would have been heard *ex parte*, but that it appeared that Mr. Menzies had withdrawn the will and codicils, as well as the sister's renunciation, from his Proctor (unknown to him), and the Court was moved to decree a monition against Mr. Menzies to bring them in. The monition issued, but it was not till the Court pronounced him in contempt, and directed his contumacy to be signified, that the will and codicils were brought in by Mr. Menzies, who then declared that he should proceed no further, as a will of a later date had been found; and he brought in the paper, which bore date the [blank] day of May, 1839, and prayed probate as executor according to the tenour, and he was sworn accordingly; but a *caveat* was entered by Messrs. A. Pulbrook and T. C. Ker, two creditors of the deceased (the latter a specialty creditor), against the probate, and they appeared (by separate Proctors), praying to be heard in

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*Menzies v.
Pulbrook.*ing to the te-
nour. — What
is the interest
of a creditor.1839.
October.

Nov. 25.

1840.
April 23.

May 30.

June 3.

June 6.

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Dec. 11.

1841.

April 22.

ARGUMENT.

A creditor
may contest a
will where no
relations.

Conduct of
the alleged ex-
ecutor.

The character
of the paper.

Circumstances
of the case sus-
picious.

opposition to the grant of probate to Mr. Menzies. The Court intimated its opinion that the creditors could not oppose probate of the will, but, at the urgent application of their Counsel, allowed them to be heard on their petition, as to their right to oppose the will, at the peril of costs. An Act on Petition was accordingly entered into, and the question was argued.

Nicholl, D., on behalf of the creditors. It has been held that, where there are no relations, or no relations willing to contest a will, a creditor is entitled to contest it, not on the same ground as the next of kin; a creditor opposing a will, if it be established, is liable to be condemned in the costs. In this case, the conduct of Mr. Menzies shews him to be unfit to have the administration of a large estate (for, although it is insolvent, the assets amount to £30,000), and he is in prison for debt. Had administration been granted to Mr. Millar (as it would have been but for Mr. Menzies' wrongful acts), he would have been in a position to oppose this later will, and put Mr. Menzies, as executor, upon proof of it; for if administration is decreed to a creditor, he has a right to oppose a will. It was not till the 6th June, 1840, more than eleven months after the meeting at Edinburgh, that this later will was produced by Mr. Menzies; who had relied on the former will and codicils up to that moment. The paper, however, purports on the face of it to be intended to operate *inter vivos* from the day of the date;* yet the day of the date is blank, though by the Scotch law, the date of a deed must be filled in on the day of execution. The body of the paper is written no one knows by whom, though the Scotch law says, the name and condition of the writer must be set forth. It purports to bear date in May, during which month the deceased was insane, and there is no description of the residence of the witnesses. These are suspicious cir-

* The primary object of the paper purported to be the conveyance over of all the deceased's property from the date thereof, for the sale of paying out of his readiest estate all debts due at its date, and payment over to him of the balance, and it was only in the event of his death before such primary object was fully completed, and of his not recalling the deed, that power of interfering in his effects after his decease was given to Mr. Menzies.

cumstances, calling for vigilance on the part of the Court. If, therefore, there is not a binding, inflexible rule to the contrary, the Court will not refuse the means of investigation to a creditor. All the cases are cases of simple administration, and, in every one, the creditor has been allowed somehow to be heard. *Elme v. Da Costa*,* *Webb v. Needham*.† In *Newman v. Bourne*,‡ a creditor was suffered to contest the interest of a person claiming under a nuncupative will, no relations appearing. In a MS. note of this case,§ by Dr. Andrews, it is recorded, as *per curiam*: "When there are no relations, a creditor has the greatest interest in the question, and the greatest right to the administration; he may be allowed to oppose a will; but if the executor prove it, he shall pay the costs." In a later case,|| Sir Edward Simpson held that a creditor, having administration decreed to him, may oppose a will without costs. A right to administration is a beneficial interest, and a court of law will direct a *mandamus* to grant administration. Then, in the absence of prior claims, a creditor must have the same right as others. In *Wood v. Goodlake*¶, the Judicial Committee held that a legatee in a codicil had a right to oppose the will, because he had a right to shew that the asserted executors had no title to put him to proof of the codicil. So the creditor here has a right to deny the title of the asserted executor according to the tenour to put him on proof of his being a creditor. A creditor has a stronger interest in the administration of an insolvent estate. Creditors are the only persons interested in an insolvent estate. Lord Mansfield said that "no next of kin ever struggled for the administration of an insolvent estate with an honest view."** If the executor has the administration, the creditors have no security beyond his personal character; whereas, if a creditor has it, they have the security of the administration bond, and the further advantage, that such creditor may be required to enter into articles to pay debts *pro rata*. In the case of *Bur-*

Ava. 3.

Munzie v. Palfreok.

The cases, those of simple administration, and creditors allowed to be heard.

In absence of relations, a creditor held to have greatest right to administration, and with administration may oppose a will.

A creditor may deny the right of an asserted executor to put him on proof of his debt.

Creditors have the only interest in an insolvent estate.

* 1 Phill. 173.

† 1 Add. 494.

‡ Referred to, 1 Phill. 178.

§ Prer. Court, 1714.

|| Referred to, 1 Phill. 160.

¶ During argument. See next case.

** *Archbishop of Cant. v. Howse*, Cowp. 145.

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Pullbrook.*Sir Geo. Lee's
decision against
creditor's right.

His error.

A creditor
may sue on an
administration
bond.

roughs v. Griffiths and Hall,* Sir George Lee held that the creditor had no right to oppose a will; but even in that case, the creditor was allowed to give in affidavits against the will, and Dr. Hay, his counsel, was heard as *amicus curie*. It was not suggested in that case that there was any universal inflexible, unbending rule, that a creditor had no right to oppose a will. Sir George Lee had shortly before† been of opinion that a creditor had no interest in an administration bond, and could not sue upon it, and upon that mistake of the law he appears to have grounded his decision. This seems to have been the opinion of the profession at this time; but in *Archbishop of Cant. v. Wills*,‡ and in *Archbishop of Cant. v. Howse*,§ it was held that a creditor had a right to sue on an administration bond. It is true that it has since been held that a creditor cannot sue on an administration bond in a simple administration, and allege non-payment of his debt as a *devastavit*, because the bond on the face of it does not mention payment of debts. In the *Archbishop of Cant. v. Robertson*,|| as reported by Tyrwhitt, Lord Lyndhurst says: "It is true that Lord Chief Justice Holt, in the course of giving judgment in *Archbishop of Cant. v. Wills*, may have said, 'By the words of the condition, the administrator is to administer well and truly: that shall be construed in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond and sue on it, and assign for breach the non-payment of a debt to him, or a *devastavit* committed by the administrator, for that would be needless and infinite.' What I understand to be the meaning of Lord Holt, upon that occasion, was this: that a creditor shall not sue for his own debt upon the administration bond unless he suggests a *devastavit*." I am bound to say, I think this a mistake on the part of Mr. Tyrwhitt, and that the report in Crompton and Meeson¶ is more correct, where

* 1 Lee's Rep. 545.

† *Hughes v. Cook*, 1 Lee's Rep. 387.‡ 1 Salk. 315; nom. "*Wilks*," 1 Salk. 178 and nom. "*Wills*" 11 Mod. 145.

§ Cowp. 140.

|| 3 Tyrwh. 390.

¶ 1 Vol. 708.

Lord Lyndhurst, instead of "unless," is made to say, "even if he suggests a *devastavit*." But that was a case of a simple administration; the question as to an administration *cum testamento annexo* is a different case, for one of the conditions of the bond of such an administrator is, that "he shall well and truly administer the effects of the deceased, and pay the debts which he did owe at the time of his decease." He, therefore, binds himself to pay the debts, in express words, and non-payment of debt would be a breach of the bond, and may be so assigned. *Folkes v. Dominique*.^{*} There are cases in which creditors have been allowed to put the next of kin upon proof not of their relationship, that being admitted, but of their interest. *West v. Wilby*.[†] In *Hawksworth v. Warner*,[‡] the Court heard the creditor, and in *Furlonger v. Cox*,[§] it excluded a son and gave the administration of an insolvent estate preferably to a creditor, who therefore was held to have a right to come forward and shew he had an interest.

Bayford, D., on the same side. The only case in which there has been a decision in these Courts against the right of the creditor, is that of *Burroughs v. Griffiths and Hall*, before Sir George Lee. In *Hackman v. Black*, the same judge, after the other case, decided that "a creditor had nothing to do with the administration bond." It is highly probable, in the absence of direct decisions, that there was a distinction between a creditor with a simple administration, and an administration with will annexed. In *Abbott v. Abbott*,^{||} the conditions of the bond were admitted sufficient to create an interest. Sir John Nicholl, in that case, said: "How are the creditors to call the administrator to account? They are primarily interested in the bond; they are to be paid before legatees or next of kin." And again: "The Court is bound to go as far as it can, to afford protection to all who may be interested: the creditors must be primarily concerned." The cases in the common law books become stronger and stronger. In *Brown v. Archbishop of Cant.*,[¶] it was decided (twelve years after the Statute of Distributions) that a creditor could

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Cases where
creditors have
been heard in
opposition to
next of kin.

Probably a
distinction be-
tween simple
administration,
and *cum test.*
annexo.

* 2 Strange, 1137.

† 3 Phill. 374.

‡ *Ibid.* 380.

§ *Ibid.* 381.

|| 2 Phill. 578.

¶ Lutwyche, 882 b.

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not, in suing upon a bond, assign as a breach the non-payment of his debt. Then in *Greenside v. Benson*,* it was decided that a creditor had so far an interest that he could put the bond in suit for non-delivery of an inventory. This was affirmed in *Archbishop of Cant. v. Howse*. *Thomas v. Archbishop of Cant.*† corrected a mistake in the report of *Greenside v. Benson*, and decided that a creditor could sue upon the bond. The last case is *Archbishop of Cant. v. Robertson*,‡ where Lord Lyndhurst's words are strong. In *Folkes v. Dominique*, an administration bond, with will annexed, is said to be out of the statute, and to be taken as a bond at common law. Then, if disconnected from the statute, the case must stand upon the terms of the bond itself. We have,

Grounds of
the creditors'
case.

therefore, these three grounds: 1st. the estate is an insolvent estate; 2nd. there is no higher claim; 3rd. the administration bond disconnected from the statute.

April 26.

Addams, D., for the executor. The true question is, the abstract point of law, whether a creditor has or has not a right to oppose a will generally, not with reference to the particular circumstances of this case. The Proctor avers in his Act, that "where there are no relations, a creditor has, and has solemnly been held to have, the greatest interest in the estate, and has a right to the administration, and may be

The general
rule against the
claim of the
creditors.

and has been allowed to oppose a *nuncupative* will:" there never has been but this one exception to the general rule. That was a case of a creditor who had administration decreed to him, though it was not extracted. Then it is contended that there is no distinction, in reason or law, between administration not decreed, and administration decreed but not extracted. There is, however, a distinction in reason and in law. In *Burroughs v. Griffiths and Hall*, the decision went upon the existence of a general rule, that a creditor had no right to oppose a will. In *Elme v. Da Costa*,§ decided by Sir Wm. Wynne in 1786, "a creditor in possession of a grant of administration allowed to contest a suit against a person asserting himself to be next of kin," all that was decided is, that the administration obtained by the creditor was to be

Apparent ex-
ceptions under
peculiar cir-
cumstances.

* 3 Atk. 248.

‡ 1 Cromp. & M. 708.

† 1 Cox, Equ. Ca. 399.

§ 1 Phill. 173.

brought in, and he was to shew cause why it should not be revoked. In *Newman v. Bourne*, the creditor obtained administration, and before it passed the seal, he was suffered to contest the interest of a person setting up a "nuncupative" will. But there are peculiar considerations which applied to nuncupative wills. The case of *West v. Willby* was under special circumstances. The general rule has never been departed from for 150 years, except in the blind case of *Newman v. Bourne*. It would be extremely inconvenient now to relax the rule, and to allow these creditors to go into a matter of pretended charge against Mr. Menzies, who ought to be dismissed with his costs.

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Menzies v. Fulbrook.

Inconveniences
of a relaxation
of rule in this
case.

Curteis, D., on the same side. The simple question is, whether a creditor has a general right to contest the validity of a will. I submit he has no such right. In *Dabbs v. Chisman*, and *Jennens v. Beauchamp*,* Sir John Nicholl said: "A creditor cannot deny an interest or oppose a will."

A creditor
cannot deny an
interest or op-
pose a will.

SIR H. JENNER.—The question is, whether the creditors have established their right to be heard as contradictors to the will; I do not, therefore, think it necessary, at present, to advert to the suspicious circumstances on the face of the paper, or to the conduct of the party.

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JUDGMENT.

Abstract ques-
tion, the only
question.

At the time when the application was first made, the Court had an impression that the creditors had no right to be heard in opposition to the will, and it was inclined to dismiss the application; but upon the urgent representation of the Counsel for the creditors, it did permit them to be heard on their petition, as to their right to oppose the will, intimating at the same time that they would do so at the risk of costs. It seems to have been admitted in argument, that a very general impression prevails in all the branches of the profession, that it is not competent to a creditor to appear as contradictor to a will in dispute, and certain *dicta* have been cited to that effect. On the other hand, it is contended that, though there may be such an impression, there is no such rule of practice recognized in decided cases, for that, in the case of *Burroughs v. Griffiths and Hall*, the question as to this important point and rule of practice was not expressly

General im-
pression in the
profession
against a credi-
tor's right to
appear as con-
tradictor.

* 1 Phill. 155.

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*Menzies v.
Pulbrook.*Application
novel.No case in
which such
right in a cre-
ditor affirmed.Effect of the
cases.Rule against a
creditor's right
adopted by Sir
W. Wynne and
Sir J. Nicholl.All the right
he has, is to
have his debt
paid.

raised and determined. Certainly, it appeared to me something of a novel application, and contrary to my own impression as to the rule and practice of the Court for many years, and although there may be no decided case which expressly determines the point, yet there is not only the understanding of the profession at the present day, but that of Proctors of this Court many years ago, that such a rule of practice did exist, and there is no case in which the point was determined in favour of a creditor's being heard in opposition to a will and in support of his own interest.

Now what is the effect of the cases cited in the argument? It is clear that Sir William Wynne and Sir John Nicholl had both a strong impression that the rule of Court was, as stated on behalf of Mr. Menzies, against the right of a creditor to be heard in opposition to a will, and both one and the other seem to have adopted the rule without any objection to its principle. In *Elme v. Da Costa*, Sir Wm. Scott and Dr. (Sir John) Nicholl, on behalf of the creditor, contended that where he had obtained administration under seal of the Court, he was entitled to be admitted a contradictor in opposition to the will; Dr. Harris and Dr. Swabey argued on the other side, and reference was made to Mrs. March's case, where the proposition in favour of the creditor was acceded to, and his right to put the next of kin upon proof of his interest was admitted. Sir W. Wynne said: "The right of a creditor is only this; he cannot be paid his debt till a representation to the deceased is made; he can therefore call on all who have a right to administer; before an administration is granted, if a will be produced, the creditor has no right to contradict or deny it, for if there is a will, or a next of kin claims the administration, then a person offers to make himself the representative, and the creditor gets all that he has a right to." This appears to me a very strong expression of the opinion of the Court, that a creditor had no right, as creditor simply, to oppose the will of an asserted testator, and that all the right he had is to have his debt paid; and therefore he might call upon those who represented the deceased to take the administration, or shew cause why it should not be granted to him; but when

a party appears to take the character of representative, the creditor has then no right to contradict the will, or to deny the interest of that party: as Sir William Wynne says, "he has got all he has a right to." Although this is not a decision strictly in point, it seems to affirm the existence of the rule. But in *Dabbs v. Chisman*, Sir John Nicholl uses very nearly the same expressions: "A creditor cannot deny an interest, or oppose a will; but a creditor in possession of an administration may do both." And here is the point upon which the question to a certain degree must hinge. Both are express as to the rule of Court, and appear to affirm the principle, that a creditor, *qua* creditor, has no right to interfere and question the interest of an asserted next of kin.

The case of *Burroughs v. Griffiths and Hall* is reported shortly in Sir George Lee's Reports, but as it is not exactly stated in what manner the question arose, the Court thought it right to have the papers looked up, to see the proceedings which led to the question. It was a business of proving, in solemn form, the will of Mr. James Strangeways, by Samuel Burroughs, sole executor, against Thomas Griffiths, a pretended creditor and claiming an interest. So it seems that Burroughs, appearing as executor, prayed probate, and Griffiths, as a creditor, alleged an interest, to shew that it was not the will of the deceased. But he did not stop here, for he goes on to say that he did not know where the whole of the deceased's relations resided, and therefore, as a matter of precaution, the Court was prayed to decree a monition of appraisement, and Hall, another creditor, prayed an inventory, and a decree against certain persons in special and others in general, to accept or refuse administration, or to shew cause why administration should not be granted to him. This decree was issued, and affidavits were exhibited as to the validity of the paper; and therefore, *primâ facie*, it would appear as if the judge had allowed the creditor to oppose the will. But, in giving judgment, Sir George Lee expressly stated, that he had heard the advocate for Griffiths, the creditor, as *amicus curiæ*, not as the counsel of a person who had any right to appear, and that the creditor had no interest to oppose the will. Now I cannot

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think that this case was decided by Sir George Lee without deliberation. It has been said in argument, that Sir George Lee considered that a creditor had no right to sue upon an administration bond, and that, being wrong upon that point, he might be wrong upon the other. Still, what was said as to the rule by Sir Wm. Wynne and Sir John Nicholl? They knew whether or not Sir George Lee thought a creditor could not sue upon an administration bond; yet they adopted the rule with the full knowledge that he had such an interest, and expressed no doubt as to the principle, that a creditor had not a right, *qua* creditor, to contradict a will, and put a next of kin upon proof of his interest.

Case of Newman v. Bourne.

The case of *Newman v. Bourne*,* was referred to by Dr. Hay in *Burroughs v. Griffiths and Hall*. Now that case occurred in 1714, and is referred to by Sir Wm. Wynne in *Elme v. De Costa*, and he says that there a creditor was permitted to contradict a nuncupative will. I directed the papers in that case to be also looked up, but unfortunately they cannot be found.

Cases establish the rule against such right in a creditor.

I cannot but be of opinion that these cases form a very strong authority to shew that the rule of practice has been as contended for by the Counsel for Mr. Menzies, and such precedents the Court must adhere to, unless it can be shewn that there is no such rule, or that it is founded upon an unsound principle.

Cases in which a creditor has been heard.

There are some cases in which the Court has permitted a creditor to be heard against the interest of a next of kin: *Furlonger v. Cox*; † *Bridges v. the Duke of Newcastle*; ‡ and *West v. Willby*; but the decisions in those cases went on the principle that it appeared that the next of kin had no interest whatever in the property. But in fact the rule is consistent with sound common sense. Sir George Lee said, it would be attended with great inconvenience if a creditor should be allowed to contradict the interest of a next of kin; and I think so too. In the first place, if a creditor were allowed to oppose a will, he must have an equal right to call in a probate, and put the party upon proof of the will in

Inconveniences of allowing creditors to oppose wills.

* *Al. nom.* " *Vaughan v. Newman*," and " *Norman v. Bourne*."

† *Prer. C.* 1811.

‡ *Delegates*, 1712.

solemn form of law. In the next place, if one creditor has a right to do this, every creditor has an equal right, and there is no knowing where to stop. Then if a creditor has a right to oppose the grant of probate of a will, the executor must have a right to oppose the interest of the creditor, and the Court might have to consider whether the creditor is barred by the Statute of Limitations, or whether the instrument upon which he claims has the right stamp, and other questions not within its jurisdiction. I am, therefore, clearly of opinion, that the principle which has been acted upon so long ought not to be disturbed. I do not see that the mere fact that there is an interest in a creditor to entitle him to sue upon an administration bond, is a sufficient reason why he should be permitted to come in and contradict a will, alleged to be a valid will. The right of the creditor is only a right of action against the person who is the representative. I am of opinion that the creditors, Messrs. Pulbrook and Ker, have no right to put the executor on proof of this will: having got a representation, they have got, as Sir Wm. Wynne said, all they want.

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Mere fact of his interest in an administration bond, not sufficient to give him a right to appear as contradictor.

It has been said that, but for the conduct of Mr. Menzies, in withdrawing the former will and codicils, the Court would have decreed administration to Mr. Millar, and that the former ought not to be allowed to take advantage of his own wrong. There might have been some force in this observation if Mr. Millar had been the party seeking to oppose this will; but these persons are not in the same situation as Mr. Millar.

Conduct of the executor.

The petition must be rejected, and I am bound to condemn the parties to the petition in the costs incurred by their opposition to the grant of probate to Mr. Menzies, on the ground that they have no interest to oppose such grant.

Petition rejected, with costs.

Judicial Committee of the Privy Council.

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Appeal from the Prerogative Court.—Judgment, against the validity of a will and codicil, reversed.

WOOD AND OTHERS v. GOODLAKE, HELPS AND OTHERS.

—*Appeal.—Definitive Sentence.*—This was an appeal from a sentence of the Prerogative Court of Canterbury, February 20th, 1839,* pronouncing against a will and codicil propounded by the executors of the late James Wood, Esq., of Gloucester.

Jan. 1, 1841. When their Lordships were prepared to hear the argument in the appeal,

Objection to the constitution of the Court. *Sir F. Pollock, Q.C.*, Counsel for Mr. Hitchings, a next of kin, took an objection to the constitution of the Court.†

One of your Lordships‡ was Counsel for the appellants (the executors) up to the very moment when the case was ripe for hearing before Sir Herbert Jenner, and in the course of the argument, some strong observations and remarks were made by him on the substantial merits of the case. As a member of the bar, I feel that I am entirely incapacitated from doing my duty to my client before a judge so situated. There may be exceptions to the general rule, but I have been accustomed to see judges of the Court where I have the honour to practise abstain from hearing a cause in which they have been even consulted, though they have not argued it. How is it possible that I can, with the firmness and boldness I ought to employ as an advocate, address one of your Lordships, who was an active and zealous advocate of one of the parties, and knows all the strong and weak points of the case? How can I be certain that I shall not encounter in the mind of that learned judge communications made to him in consultations with his clients? It will be utterly impossible for me to discharge my

* A very full and carefully digested report of the judgment in the Court below is given in the *Monthly Law Mag.* for April, 1839, 4 vol. 155.

† The Court was then composed of Lord Brougham, the Vice Chancellor (Sir L. Shadwell), Mr. Justice Erskine, and Dr. Lushington.

‡ Dr. Lushington.

public duty, as a member of the English bar, before the Court as it is at present constituted, and I respectfully but firmly declare, that I cannot, and I will not, be a party to a proceeding so unusual. I hope, therefore, that your Lordships will give my client an opportunity to choose some other Counsel.

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DR. LUSHINGTON.—Having been a member of the bar PER CURIAM when this case was argued in some of its stages in the Court below, I should have been most anxious to avoid taking any part in hearing the appeal in this Court. In deliberating upon the course I ought to take, I naturally referred to precedents of persons in similar situations, and I found that, when Sir A. Hart was made Vice-Chancellor, some discussion took place as to whether he should hear causes in which he had been Counsel; but it was determined, without objection, that he ought to proceed to the execution of his duty. With regard to this individual case, looking at its great importance, I felt the whole force of the objection: but when I proposed it to other members of the Judicial Committee (Mr. Justice Bosanquet and Mr. Baron Parke), stating that I had seen the evidence and argued on the evidence, and offering to absent myself, it was thought that, with regard to the convenience of the parties, the necessity of having the appeal heard, and the great evil of delay, I should not refuse to sit in this case. The objection, however, being now raised, and as I hold it to be a matter of the utmost importance, not only that justice should be done, but that all the parties should be satisfied that no possibility of bias exists, as respects myself, I request of your Lordships that I may be discharged from performing my duty in this case. Precedents.

LORD BROUGHAM.—What we have to complain of, as well as the other parties, is, the late period at which the objection is raised, when we are prepared to go on with the case.

Sir F. Pollock.—It was not till this day that I had the remotest idea that Dr. Lushington would sit.

LORD BROUGHAM.—We must have an affidavit from the agent of the party who raises this objection, that, at the last sitting of the Court, he was not aware that the committee Affidavit, in reference to costs.

- Aug. 16. for hearing this appeal would include Dr. Lushington. This is necessary in reference to the costs of the day.
- Wood v. Goodlake.* The case was subsequently argued before a new committee.*
- New Committee. LORD LYNDEHURST delivered the judgment of their Lordships.
- Aug. 16. This is an appeal from a judgment of the Prerogative Court of Canterbury, pronouncing against the validity of a certain paper writing, dated the 2nd of December, 1834, and propounded with another paper writing, as together containing the will of James Wood; and also against the validity of a codicil propounded by the legatees, dated July, 1835.
- JUDGMENT. History of testator. The testator was a man far advanced in life, being about eighty years of age at the time of his death. He had for many years been engaged in trade in the city of Gloucester, as a mercer and banker, and had, by great attention to business, by his careful and parsimonious habits, and by bequests from certain of his relations, accumulated a very large estate, amounting to several hundred thousand pounds. The
- Circumstances of the case. extent of the property in controversy, the obscurity of some of the circumstances, and the extraordinary and mysterious nature of others, have given to this proceeding much interest; and have led to very full and able arguments at the bar, which have been attentively listened to and considered by the Court, and with the more anxiety and care on account of the high character of the very able and learned judge whose decision we have been called upon to review. All the material facts, however, have been so fully stated in the elaborate judgment delivered by that learned judge, that we feel ourselves relieved from the necessity of entering into any minute detail of them, or to occupy any considerable portion of time in stating the grounds of the opinion we have formed.
- Stripped of extraneous matter, question of a very limited compass; The question, indeed, stripped of extraneous matter, resolves itself into a very limited compass. And, first, it should be observed, that there is no dispute as to the competency of the testator; although very far advanced in age,

* Consisting of Lord Lyndhurst, Lord Langdale (M.R.), Sir L. Shadwell (V.C.), Mr. Baron Parke, and Sir Joseph Littledale.

his faculties were entire, and his attention to business unimpaired. There is no question raised as to the exercise of any undue influence, which would indeed have been inconsistent with the known character of the testator. The points in controversy relate both to the will and the codicil. The question as to the will is confined to the construction of the papers dated respectively the 2nd and 3rd of December, denoted by the letters A and B, and to the circumstances connected with those instruments. We have felt it our duty against being unduly influenced in our judgment by the mis-conduct of some of the parties interested in and connected with this case, imitating in this the caution and circumspection of the learned judge in the court below. Adopting then his view, we shall consider the case with reference to the papers A and B, as it would have existed at the death of the testator, if A had not been improperly removed and annexed to B, but had remained in the possession of Chadborn; with this reserve, however, that nothing is, under the circumstances of this case, to be presumed in favour of the appellants. Pursuing this course, then, it will, we think, be convenient and proper first to consider the paper B. That paper is attested by three witnesses, the execution of it is proved, and there is no doubt of its being the act of the testator. This paper, however, is inoperative by itself, the property being given to executors, and they are not named in the instrument. We are not to suppose this omission to have been by mistake or accident. The business was not transacted in a hurry. Chadborn, by whom the will was drawn, was a lawyer of experience; the testator must have known that the executors were not named in the paper. He read it over twice in the presence of the witnesses before he signed it. He was a man of business, and even of some experience in the making of wills. The omission must have been observed. The necessary inference therefore is, that, in bequeathing the property to his executors, he must have meant executors already named, or thereafter to be named in some other instrument. The first appears the natural construction; the second forced and very improbable. If he

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apart from mis-
conduct of
some of the
parties.

Paper B.

Inference from
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names of exe-
cutors.

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considered he had appointed his executors, it was natural to mention them as he had done—generally, his executors. If he referred to a future appointment, it would have been almost of course to describe them as executors hereafter to be appointed, or to have used words to that effect. Again, the testator must, we think, when he executed paper B, have meant to make an effective disposition of his property. Why should he have made his will bequeathing his property to his executors, and doing nothing more, if he had not fixed upon the persons who were to be his executors? It was doing nothing; it was altogether an idle act, and wholly inoperative for any purpose he can be supposed to have had in contemplation. But if he had fixed upon them, he would naturally have named them, unless he had already done so in some other instrument to which he was then referring. It was obvious, too, he considered he was doing an act that was to have some effect. He was anxious for Chadborn to come to finish the business. After he had twice read the will over, he asked, in the presence of the witnesses, whether he could alter it? Why put that question if he did not consider it to be a complete will—if he knew it to be inoperative until something further were done to make it effectual? It is also to be observed that there is no trace or suggestion of any subsequent appointment of executors; and yet in the codicil, made a few months afterwards (the handwriting of which we think is fully established, and which we are hereafter to consider), the testator again speaks of his executors as persons already appointed. He says, "I wish my executors would give such and such sums, &c.;" and, after stating the legacies, he proceeds thus: "and I confirm all other bequests, and give the rest of my property to the executors for their own interest." It may, indeed, be said that there might have been an intermediate appointment of executors and that this may have been purloined or destroyed. But such an appointment, to be effectual, in the case of real as well as personal property, must have been attested by three witnesses; and if any such instrument had been executed in this interval, it is scarcely possible to suppose there would have been no knowledge, or even trace of it. All this tends

to the conclusion, that the testator had already named his executors in some instrument, and that he referred to that instrument and to the executors so named when he executed the paper B. The existence and production of such an instrument would, we think, render this conclusion irresistible.

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That they
were already
named.

This being our opinion as to the true import and construction of paper B, the next question will be, was there any such instrument? This leads then to the consideration of the paper marked A. It bears date the 2nd of December, and is signed by the testator, for we are satisfied as to the handwriting. It is entitled—"Instructions for the will of me, James Wood, Esq., of Gloucester," and it proceeds thus:—"I request my friends Alderman Wood, of London, M.P., John Chadborn, of Gloucester, Jacob Osborn, of Gloucester, and John S. Surman, of Gloucester, to be my executors, and I appoint them executors accordingly." In this paper then, purporting to be drawn up by the direction of the testator, signed by him, and dated the day before the date of the will, he expressly names his executors. "I request them to be my executors, and appoint them executors accordingly." The will B begins by referring to instructions: "I, James Wood, do declare this to be my will for disposing my estates, as directed by my instructions." The expressions, we think, import instructions in writing. If the paper A then be genuine, there were instructions of this description dated only the day before, and signed by the testator. The natural inference therefore is, that, in speaking of instructions, he referred to these, and in these instructions he had named his executors: "I request my friends (naming them) to be my executors, and I appoint them executors accordingly." We think, then, if this paper be genuine, that no reasonable doubt can be entertained that the executors, to whom the testator thus bequeathed his property, were meant to be the persons named as such by him in the paper entitled "Instructions of the 2nd of December." If the testator in the paper B meant, as we think he did, executors already named, they must have been the executors named in the instructions of the day before, or there must have been some subsequent written appointment of executors in the interval (an interval

Expressly
names the ex-
ecutors.

Inference,—
referred to in
paper B.

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Effect of re-
ference not im-
paired by paper
A being in-
structions.

Objection,
that paper A
not the instruc-
tions referred
to, because dif-
ferent disposi-
tion from paper
B, immaterial.

of only a few hours), of which there is no trace, and which is extremely improbable. If the testator, then, intended to refer to paper A, and to the persons therein named as executors, the circumstance of the paper being entitled and intended as instructions for the will would not, we think, impair the effect of the reference. For, suppose he had in terms said, "The executors named in my instructions of the 2nd of December," this would indisputably have been sufficient; but if we are satisfied, from the circumstances, that he referred to paper A, and to the executors therein named, the same consequence would necessarily follow. The effect of the reference to A would be the same as to any other paper, although A might be intended either in the whole or in part as instructions. It has been argued, that the instructions in paper A could not have been the instructions referred to, because the testator disposed of his property, not according to these instructions, but in a different manner. For, first, as to the personal property; the instructions give it to the executors as joint tenants, whereas by the paper B they take it as tenants in common. This objection does not appear to us to be of any weight. The instructions are general; the will more precise and specific. In this there is not only no inconsistency, but it is not at all unnatural. Secondly, then, as to the real property. In the paper A, the testator says, "He shall dispose of the same to such persons and in such parts, as he shall by any writing endorsed therein direct." By the will, the disposition of the property, both real and personal, is on a separate paper, and without endorsement. This also appears to us to be an immaterial circumstance.

These observations and this reasoning have proceeded upon the assumption that the paper A was what it purports to be, the act of the testator, and signed by him on the day it bears date, *viz.* the day before the date of the will. We are, as I have already stated, satisfied as to the signature: we believe it to be the handwriting of the testator. The paper bears date on the 2nd of December, and there is no appearance of any alteration or addition. The date, we think, was obviously written at the same time as the body of

the instrument. But the paper is in the handwriting of the legatee who would take largely under it. It comes also out of his possession, and not out of the possession of the testator, which would have been the proper custody of it after the execution of the paper B. These circumstances, and the conduct of Chadborn in secretly changing the custody, are justly calculated to create suspicion, and according to the rule of the Ecclesiastical Court, in granting probate, proof of the handwriting alone of the alleged testator would not in such a case be sufficient; there must be further adminicular or corroborative evidence. Is there then such evidence in his case? And if so, is it sufficient, in connexion with the other circumstances, to satisfy the Court that the paper A is what it purports to be, and that the testator, when he signed and published the paper B, and bequeathed his property to executors, meant the persons named as such in the paper A?

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circumstances;removed by
corroborative
evidence.

And, first, it is not immaterial to observe, that Chadborn, Osborn, and Surman were all present, or at hand, when the will was signed: neither of them, however, attested the execution, but two servants and a stranger, Chadborn's clerk, were called in for that purpose. The inference obviously is, that they were intended to take some benefit under it. There is nothing improbable in the selection of persons named as executors: there is nothing improbable arising out of the amount of the property, as it was subject to be reduced by subsequent legacies, which it is obvious the testator intended to give. In considering the evidence of recognition, I pass over the many loose declarations made at different times in general conversation. We place no reliance upon them—they are even of less value than they might otherwise be, from the insincerity and sort of low cunning exhibited in the character of the testator. Some point to Chadborn alone as the party to be benefited; but these are open to the explanation, that they were used as an excuse to prevent claims by tenants, and were not really true. Sometimes Alderman Wood and Chadborn are said to be the parties to be benefited; and they two are said to be his "executors, and to have the bulk of his property." I allude to the evidence of

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Mrs. Timbrell. If on that occasion he said that they were to be two of his executors, and to share in the bulk of his property (a very slight change), such declaration would accord with the supposition that paper A was referred to. It is remarkable that in no instance is any person mentioned as his executor, except some one of the four named in the paper A. There are declarations mentioning Chadborn, or those in the house, namely, Osborn and Surman, as having the management of his affairs; but there are none mentioning any one else as executor or manager, except one or more of the four mentioned in paper A. The declarations in favour of other individuals as objects of his bounty do not affect this question; for they are reconcilable, if true, and really expressive of the deceased's intention, with the supposition, which is undoubtedly correct, that he meant to leave many legacies to others. But the most important recognitions are those which are proved by Sutton and Stevens, and to which it will be proper more particularly to advert. The first shews a motive for making a will appointing executor arising before the 1st of December—namely, the opinion of the customers as to the necessity of providing for the payment of their accounts. Sutton appears to have been on very friendly and intimate terms with the testator. The testator had at different times expressed to him his dissatisfaction that the deposits at his bank were diminishing; and in reply, Sutton reminded him that, unless the public were satisfied that their balances would be immediately receivable in the event of his death, his banking business must diminish notwithstanding the security derived from his large property. Sutton says:—"In the afternoon of Monday, the 1st day of December, 1834, I accidentally called at the deceased's, and saw in the shop Mr. Surman, who addressing me said, 'Mr. Sutton, you have a great deal of influence with Mr. Wood; we want him to make a will, and wish you to speak to him about it;' or to that effect. I did not at that time see the deceased, but went away, telling Mr. Surman that I would call again in the evening. Soon after six o'clock the same evening, I went to the deceased's and found him in his parlour and alone. I sat and conversed with him

for some time on general topics, until, at length, I opened the subject by saying, that I thought it was time that 'his will was made,' or that 'he made his will.' His reply was very short; he said, 'Ay, ay, I must.' Upon this I dropped the subject, and soon after took my leave." "Of the date," he says, "I am certain, by reason of a note which I made on the 2nd of December, 1830, of the visit. In the course of the same week, and I believe on the 4th of December, 1830, I again called on the deceased, and going with him into his parlour, I reverted to the subject of making his will, rather, as I believe, hinting at it, than mentioning it in direct terms. The deceased readily apprehended me, and said, 'I have settled my affairs; my debts will be paid when I die.'" Taking the whole of these conversations together, he must, we think, have meant to convey to Sutton that he had so settled his affairs, that his debts would be paid immediately on his death, which could only be the case if he had appointed executors. His reply on the 1st of December shews, that he had not then made his will; he says, "Ay, I must." Three days afterwards, on the 4th, he says, "I have settled my affairs; my debts will be paid when I die," thereby implying that he had appointed executors. The appointment, then, must have been made between the 1st and the 4th, which corresponds precisely with the dates of papers A and B, and shews that B, not naming executors, must have referred to some other instrument executed between the 1st and the 4th, by which they were named, and which corresponds with and confirms paper A. Sutton adds, that the impression made on his mind by this conversation was too powerful to be forgotten; for it struck him as remarkable that the testator did not say he had made his will, but only that "he had settled his affairs," an expression, the witness says, which struck him forcibly. He afterwards adds, in answer to a further interrogatory put to him by Thomas Helps, that "the impression made on his mind by what the deceased said, namely—'I have settled my affairs; my debts will be paid when I die;'—was, that he had not made a will," that is, a will by which he had bequeathed his property in the way of bequest or legacy. He seems, therefore, to have

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Dec. 1840;implying ap-
pointment of
executors be-
tween 1st and
4th.

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Names of ex-
ecutors men-
tioned by tes-
tator in Sept.
1835.

Answer of
Mrs. Goodlake.

understood from this conversation that the deceased had made a will so far only as to secure the payment of his debts in the event of his decease, which implied the appointment of executors; and, accordingly, Sutton continued to bank with the testator to the time of his death. This, we think, materially confirms the case of the appellants. The evidence of Stevens, upon which considerable stress has been laid, also appears to us to be entitled to much attention. He and his father had cash deposits in the hands of the testator to the amount of upwards of 2,000*l*. They were desirous of knowing what the testator had done as to his will, as they might be put to much inconvenience respecting this balance in the event of his dying intestate. The witness was empowered and directed by his father to withdraw the balance unless the explanation should be satisfactory. Upon the application made by Stevens to the testator, he said, "I respect your father very highly; do tell him that I have made a will and that I have left my property to four individuals, or four good men, and they are my executors, and they will pay you and your father and every one else." Speaking of the executors, he said, "Two of them are Alderman Wood and Jacob,"—that is Osborn. Upon this assurance, the witness said, he continued to bank with the testator. This took place in the month of September, 1835. It was not a loose and careless conversation, but, on the contrary, a very distinct recognition—very deliberately made in the course of business, and is strongly confirmatory of the case of the appellants.

The answer of Mrs. Goodlake has been referred to. We think it admissible, though under all the circumstances of her position, and in the absence of any opportunity for cross-examination, we should not, if it stood by itself, consider it as having much weight. She was alone with the testator for a considerable time in the forenoon of the Monday before his death, having been sent for in consequence of his illness. Mrs. Goodlake, on that occasion, spoke to him about the propriety of making his will, when the testator, in allusion, as she believed, to her various suggestions on this subject, after tracing his relationship to the respondent

and her son, and speaking of the uncle of the respondent, who had been a trustee under the will of the testator's father, "Cousin John," he said, "was a very good kind of man; then I shan't live long; it will be all right by-and-by;" or to that effect: and the testator, proceeding to speak about his will, said, "Don't fret yourself to fiddle-strings; Alderman Wood will spend the money very properly. Chadborn has done all my business many years, and he has been very honest and attentive. Mr. Osborn has been a very faithful servant, and our John I always loved. He always was a great favourite of mine; he knows all about it, and can tell you all about it." This is also confirmatory of the written documents, and, if correct, shews that the four persons named in the paper A were objects of the testator's bounty. It appears singular, indeed, that Surman had not made any communication to his mother, Mrs. Goodlake, on the subject of the will, and yet he certainly was present when it was signed and published by the testator.

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States a declaration confirmatory of the documents.

The result, then, is this:—We are of opinion that the paper A, entitled "Instructions," was signed by the testator, and on the day it bears date: That in the paper B, the testator referred to these instructions, and to the persons whom he had therein named as his executors: That, in addition to the proof of handwriting, there is sufficient confirmatory evidence to satisfy us that the paper A was the act of the testator, and that he meant, in mentioning his executors in paper B, the executors whom he had previously named or appointed in the paper A. We must not be understood to say that this is a case free from doubt; we consider, on the contrary, that it is involved in difficulty, and that it is in many of its circumstances painfully obscure. But, after much and attentive consideration, we think the balance of evidence, and by that we must be governed, is in favour of the appellants.

In favour of appellants.

An objection of form was taken at the bar, but was not, I think, much pressed—namely, that there was a material variance between the Allegation and the proof. We think the objection cannot be sustained. If enough of the Allega-

Objection, variation between plea and proof,—not to be sustained.

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The codicil.

tion is proved to entitle the party to probate, that is all that is necessary.

Next as to the codicil, we think it is (both the body of the instrument and signature) in the handwriting of the testator. The evidence in the affirmative so greatly outweighs that which is opposed to it, as to satisfy us on this point. That evidence has been so thoroughly sifted, both at the bar and by the learned Judge in the Court below, as to render any further examination of it unnecessary. It derives further strength and confirmation from the conduct of the executors. They were intimately acquainted with the handwriting of the testator, and with every thing relating to him. They saw the codicil, and expressed no doubt as to its genuineness. It is true, that the letter of the 13th of June, to the Mayor of Gloucester, was written before they had seen the original; but they afterwards saw and examined it, long before the post left London on that day. They made no objection, and in their subsequent letter, and in the search for the other codicil, they acted upon it as if it were a genuine instrument. It was not till some time afterwards that they altered their course, and treated it as a forgery. But, according to the rule of practice to which I have before adverted, the Ecclesiastical Court will not grant probate on the sole evidence of the handwriting of a testator, where that is disputed. There must be some confirmatory proof. This confirmatory proof must evidently vary with each particular case, and would require to be more or less stringent, according to the weakness or strength of the evidence as to the handwriting. In some of the cases referred to in the arguments at the bar, the confirmatory proof appears to have been very slight. We think, however, that there are in this case, in addition to the very strong evidence of handwriting, several circumstances, leaving, in the result, no doubt on our minds that the codicil was the act of the testator.

In addition to strong evidence of handwriting, circumstances shew it to be the act of the testator.

It is evident that he had it in contemplation to make a codicil or codicils to his will. This appears as well from the will itself, as from the question put by him to Chadborn &

the time of executing it. It is not, indeed, probable that he would have left so very large a property to be enjoyed solely by his executors. There is nothing in the dispositions which it contains to lead us to doubt the genuineness of the instrument ; and if it does not notice every person who might naturally have been an object of his bounty, this may be explained by the circumstance of there having been a previous codicil, to which this instrument refers. Several facts insisted upon to shew that the paper was a forgery tend strongly, upon investigation, to prove that it is the act of the testator ; as an instance, I refer to the incorrectness respecting the name of Counsel. It is not probable that a person forging such an instrument would have misspelt it, particularly a person who must, from the nature of the dispositions, obviously have been well acquainted with the testator and his connexions. So as to the use of figures instead of words, in stating the sums bequeathed to the legatees. A forger would have conformed to the usual practice of the testator. Again : stress was laid upon the peculiar manner in which the *s* was formed in the word " executors." It is a mere cross, whereas his usual practice was to make an *s*, and then to cross that letter. But on a careful search, instances have been found among the books and papers of the testator, and which were, as the learned Judge observes, very reluctantly produced, of similar deviations from his usual practice, and also of the same inaccuracy in spelling the name of Counsel. These are singular and striking coincidences, and there are others of a similar nature, strongly confirmatory of the evidence of the handwriting. It is true that these are minute circumstances ; but their very minuteness, we think, adds to their importance, and affords the strongest internal evidence of the genuineness of the instrument. It has been observed, and we think justly, that it is not at all probable that a person forging such an instrument would have referred to a former codicil, and thereby unnecessarily increased the means of detection. The very amount, too, of the legacies, and, above all, the charges against the executors, would almost of necessity lead to opposition. Looking, too, at the different disposi-

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tions in the codicil, it is almost impossible to suppose that if the instrument had been a forgery it would not have been detected by some inaccuracy or exposed by some inconsistency. There are other circumstances of confirmation which are not immaterial. It is proved that the testator had, by a former will, bequeathed a sum of £20,000 to the city of Gloucester. This was at a period when his circumstances were very different from what they were at the date of the codicil. He had in the interval received large accessions to his property ; but unless the codicil be genuine, there is no bequest to the city. In a conversation with Hopkins, in February, 1836, after the date of the codicil, and in the presence of several persons whose names are given, the testator, in allusion to some suggestion made by the witness, stated that he had not forgotten " Old Gloucester," or " Poor old Gloucester." And this corresponds with the evidence of Elizabeth Whalley, who states that on a former occasion he had said, " he would do great things for old Gloucester." It is stated, indeed, that he sometimes declared that the corporation should not be the better for him ; but his declarations in favour of the city, and particularly that to Hopkins, made after the date of the codicil, agree with the documentary proof and confirm it. Again, in the codicil there is a bequest to a relation, Samuel Wood, of £14,000, and to his family of £6,000. He had, in fact, six children. The £6,000 and the £14,000 make £20,000. He had given the same sum (£20,000) in each of the two preceding bequests to two other relations, Mrs. Goodlake and Thomas Wood. Now it appears, that in a conversation with Samuel Wood the testator had asked him how many children he had, and the form of this bequest appears to be the result of that conversation, and corresponds with it. These circumstances more or less weighty, and in particular the internal evidence to which I have referred, are in confirmation of the codicil, and, added to what we consider as the all but conclusive evidence as to the handwriting of this holograph instrument, satisfy us that the codicil was the act of the testator.

Suspicious
manner in
which the codi-

But then it comes nobody knows whence or from whom. It was sent anonymously to one of the parties claiming under

it. This is a circumstance justly calculated to create suspicion, and would, under ordinary circumstances, have been a most material and formidable objection. But the evidence in this case leads to the conclusion that the papers of the testator have been improperly dealt with. It is proved, as we think, satisfactorily, that Chadborn, who had committed or attempted a fraud, in the annexation of the papers A and B, was in the house of the testator at an early hour on the day after his death, while Osborn and Surman were still in bed. The explanation is insufficient, and at variance with the proof. It is admitted that papers were burnt, and one of them probably of a testamentary character. These circumstances appear to us greatly to weaken the force of the objection. Adverting here again to the charge against the executors, would a person forging such an instrument have made such a charge? On what grounds? It was not known at the time when the codicil was produced that papers had been burnt; that there had been any thing irregular in the conduct of the parties. They were respectable in station and character. But the misconduct and burning are charged, and it turns out most unexpectedly to be true. The person, therefore, who produced this paper, must have had some knowledge of these transactions—some connexion with them; and this explains the possession of the codicil, and shews why it was not produced from the repositories of the testator.

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*Wood v.
Goodlake.*cil made its
appearance.Papers of tes-
tator were im-
properly dealt
with, which
weakens the
force of the ob-
jection.

Then as to the alleged cancellation. We think, if this be a genuine instrument, that the *onus* to make out the fact of cancellation is on those who oppose the codicil. It seems that a corner had been burnt, the paper torn through, and in one place across the signature; but by whom, and under what circumstances, does not appear. There is nothing whatever to shew that it was done by the testator; or, if so, with what intention it was done. If it be a genuine instrument, it proves that there was also another codicil, which is not forthcoming. It is obvious, we think, that it must have been improperly dealt with; for if it was defaced by the testator, he would either have entirely destroyed it, or it would have been found in this state among his papers. The cir-

Alleged can-
cellation: *onus*
of proof on the
opposers of the
codicil.No evidence
that done by
testator.

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Goodlake.*Codicil ad-
mitted to pro-
bate.All costs out
of estate.

cumstance of its being in other hands shews that a fraud has been practised, and that no safe conclusion can be drawn from its appearance, that it was burnt or torn by the testator. But even if it had been found among the testator's papers at the time of his death, we incline to think some further evidence, beyond its present appearance, would be necessary to shew that he intended to cancel it. Our opinion, therefore, is, that the codicil ought to be proved.

Another question remains; the question of costs. We think it reasonable and proper, in this case, that the costs of all the parties, as well here upon the appeal as in the Court below, should be paid out of the estate.

END OF TRINITY TERM, AND THE SITTINGS
AFTER TERM.

Admission during the Term:—

AS PROCTOR.

24th June.—CHARLES SLADEN, Esq., Not. Pub.

MICHAELMAS TERM, 1841.

High Court of Admiralty.

NOVEMBER 4.

THE "DUKE OF SUSSEX."—*Act on Petition.*—This was a suit on behalf of her Majesty, in her office of Admiral, against the steam-vessel the *Duke of Sussex*, belonging to the Commercial Steam-packet Company, for damage done to her Majesty's ships *Thalia* and *Africaine*. It appeared that, between eight and nine o'clock on the evening of the 14th June, 1840, these two vessels were lying at their usual moorings in the river Medway (which they had occupied since April, 1839), when the *Duke of Sussex*, having in tow the *Chieftain*, a vessel deeply laden with timber, from Gillingham, for Chatham dockyard, was seen coming round Cookham-wood Point, about two hundred yards from where the *Thalia* was moored. When the interval had lessened to sixty yards, the steamer was hailed from the *Thalia*; but, nevertheless, the *Chieftain* (the vessel towed) came "end on" against the bows of the *Thalia*, and drove her against the *Africaine*, slightly damaging both vessels. The night was perfectly fine; the tide was not half-flood. On the part of the steam-vessel, the defence was, that the vessel towed was deeply laden, inert, and would not obey the helm, so as to follow in the wake of the tug; that the two frigates being moored in the centre of the river (a very inconvenient place), the *Chieftain* came in contact with the *Thalia*; that the owners of the *Duke of Sussex* were exonerated from responsibility, first, because the collision was accidental; and, secondly, even if blame was attributable to any party, it was to the *Chieftain*, which was in charge of a pilot. The

Collision. — Action for loss by damage, at the suit of the Crown, not sustained. — A steamer towing the vessel that came in collision (which had a pilot on board) not responsible for the damage. — The vessel towed exonerated by having a pilot. — Crown cannot be condemned in costs.

Nov. 4. action was entered for £150. The Court was assisted by Trinity Masters.*
Duke of Sussex.

Sir J. Dodson, Q. A., and Phillimore, D., for the Crown; Addams, D., and Curteis, D., for the steam-vessel.

SUMMING UP. DR. LUSHINGTON (addressing the Trinity Masters). Although the damage in this case is of small amount, yet the question involves a point of law (raised, I believe, for the first time in this Court) which is of no slight importance to the mercantile interests of this country.

Collision not the effect of inevitable accident. It has been contended that this collision may have arisen from inevitable accident. I hardly think I should be justified in putting that to you as a question of fact, because it is scarcely possible to say, that, under the circumstances admitted on both sides, there must not have been blame attributable somewhere; and if so, the collision cannot be said

Questions of fact. to be the effect of inevitable accident. The three questions of fact are substantially these: Whether the collision was occasioned by any error or negligence on the part of the steam-vessel in the performance of her duty? whether it arose from an error of the pilot on board the *Chieftain*? or whether from some defect in the *Chieftain* herself, or some mismanagement or misconduct on the part of her master or crew?

Question of law. The question of law which has been mooted is this: It is contended, on behalf of the Crown, that the steamer having the guiding or towing of the *Chieftain* devolved upon her,

Position of the Crown, that the towing-vessel was responsible, of those on board the steamer and her owners are responsible for the damage, though the steamer might be following the orders of the master of the *Chieftain*, or of the pilot on board that vessel. On the other hand, on the part of the owners of the steamer, it is said that those on board of her were bound to attend to and obey the orders of the licensed pilot; and that, if they did so with due expedition and with adequate skill, they would not be responsible for any error in those orders, or any consequences which might arise from obeying them. Now I am of opinion that the Crown cannot maintain the position it has sought to maintain; and I will state briefly the reasons why I think so.

not maintainable.

* Captain Welbank and Captain Weynton.

It is perfectly notorious that, by law, where there is a licensed pilot on board, the directions of that licensed pilot, within the limits of his vocation, must be obeyed; and that the owners of the vessel having such licensed pilot on board, where the master and crew with adequate skill duly execute those directions, are exonerated from the consequences of any mischief that may ensue. Such is the law when a vessel is solely under the directions of a pilot, and not towed by a steamer. The question is, whether, being in tow of a steamer, that circumstance can alter the liability of the parties?

Nov. 4.

Duke of Sussex.

Reasons.

Let us see what would be the consequence of taking the responsibility from the pilot on board the vessel towed, and casting it upon the steamer. In the first place, there would immediately ensue a conflict of authorities, because the question would be, who should give directions as to the course to be steered, and who should obey those directions? and, if there was a difference of opinion between those on board the steamer which had the vessel in tow, and those on board the vessel towed, and the pilot, the inevitable consequence must be inextricable confusion. And, again, what would be the consequence as relates to the owners of the vessel herself? As the law now stands, if there be a licensed pilot on board, and the directions of the pilot are duly obeyed, the owners of the vessel are not responsible for damage done; but if you deprive a pilot of his authority, and if the steamer is not bound to follow the directions of the pilot, there would be an end in law of that exoneration from responsibility which exists at the present moment, because then the steamer would become the agent of the owners of the vessel; and being not protected by Act of Parliament, the owners of the vessel would become responsible. [*The Queen's Advocate.* This is not a case in which the owners were bound to take a pilot on board.] Then that ought to have been directly put in issue as a question of law: I have great reason to complain that you have not raised a question of law so important. Under the statute, not only is the owner of a vessel exonerated in cases where he takes a pilot on board, under the compulsory clauses of the Act, but he is also exonerated, according to a recent de-

Consequences
of removing
responsibility
from pilot on
board vessel
towed.

Where a pilot is taken on board a vessel under the statute, though

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*Duke of Sussex.*not compulso-
rily, owners ex-
onerated.Pilot on board
vessel towed,
the responsible
party.

OPINION.

Steamer not
to blame.*Case of Lucey
v. Ingram.*

cision of the Court of Exchequer,* where he takes a pilot on board, not compulsorily, but of his own free will. This point being left in darkness, it is impossible for the Court to come to a conclusion upon it, and therefore I will lay down the principle of law as it stands. Whether the pilot was taken on board in obedience to the compulsory enactments of the statute, or in a case where the statute says a pilot "may be" taken (for the statute states either), there is an indemnity to the owners of the vessel; and in either of these cases I should hold that responsibility does not attach to the owners. I am of opinion, that the party responsible for the due navigation of the *Chieftain* was not the steamer, but the pilot; therefore, if it should turn out as a matter of fact, that there was no error or negligence on the part of the steamer, but that those on board fairly and properly executed the directions given to them by the pilot, I must hold the steamer to be exonerated. I therefore will request these gentlemen to state, whether they are of opinion that this collision arose from the error of the pilot or the persons on board the *Chieftain*, or whether from the gross negligence or want of skill of the persons on board the steamer.

THE TRINITY MASTERS.—Our opinion is, that a vessel employing a steamer employs her to facilitate the transport of that vessel, instead of using the ordinary labour of the crew, and the steamer, therefore, is not responsible for any act done under the direction of the pilot and the master of the vessel towed. There was not any blame on the part of the steamer—certainly not.

DR. LUSHINGTON.—That is quite sufficient. (To the Queen's Advocate). If you think there is any thing to take the case out of the ordinary principle of law, I will hear you.

Sir J. Dodson.—I was not aware of the case to which the Court referred, in which it was held that owners are not responsible where a pilot was on board the vessel, whether compulsorily or not.

DR. LUSHINGTON.—Yes: It was decided in the Court of

* *Lucey v. Ingram*, rep. in *Addenda to Abbott, Shipp.* Ed. 1840. p. 600.

Exchequer, after very mature consideration, that the words "wanting a pilot" were not confined to a vessel compelled to take one on board, but applied to cases where the owner of the vessel thought fit to require one. It is decided that the words "in pursuance of this Act" mean not compulsion, but that a pilot might be taken on board, though there was no penalty if he were not taken.

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Duke of Sussex.

Addams.—Does the Court condemn the Crown in the Costs, or recommend it to pay the costs? The damage amounted to only £25, and the costs will be £90.

DR. LUSHINGTON.—How can I condemn the Crown in costs? There has been a deal of wavering upon this point; but I apprehend that the true principle is, that the Crown can neither give costs nor take them.

Crown cannot be condemned in costs.

(Damage sued for pronounced against, and the cause dismissed.)

Damage sued for pronounced against.

THE SAME.—*Act on Petition.*—This was another suit by the Crown against the same steamer, for damage done by her to her Majesty's steam-vessel *Lightning*, which, on the 3rd of January, 1841, about noon, was proceeding up the river towards Woolwich, and when in Half-way Reach, observed the *Duke of Sussex* going down the river with the ebb tide, the wind W.N.W. Seeing the steamer coming "end on," and fearing a collision, the officer in command of the *Lightning* acted upon a rule laid down by the Trinity House, and sanctioned by the Government as proper to be observed by steamers—namely, that when two steamers are on different courses, and by continuing their respective courses there would be a risk of their coming in collision, each vessel should put its helm a-port, so as to pass on the larboard side of each other. The *Duke of Sussex*, however, put her helm to starboard, and the vessels came in contact. On the part of the *Duke of Sussex* it was set up, that the full force of the ebb tide runs N. of Half-way Reach, and very slack to the S., and consequently, it is a rule or custom for steam-vessels coming up the river to adhere to the S. side of the mid-channel, and those coming down to keep to the N.

Collision.—Action for damage at the suit of the Crown, sustained.—New rule of steam navigation, promulgated by the Trinity House, superseding a custom of the river.

Custom of the river.

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Duke of Sussex.

ARGUMENT.

Facts shew
that the two
vessels were
sufficiently
apart to have
kept their
courses.

SUMMING UP.

The new rule.

Binding upon
steam-vessels.

Its true mean-
ing.

Sir J. Dodson, Q. A., and Phillimore, D., for the Crown. submitted that the *Duke of Sussex* had contravened the rule prescribed by the Trinity House, and was in the wrong.

Addams, D., and Curteis, D., for the Duke of Sussex. It is clear that this vessel, being a Gravesend packet, must have been cognizant of the fact that the force of the tide was N. of the mid-channel, and it being an object with her to perform her voyage as quickly as possible, it must be presumed that she was N. of the mid-channel. It is equally clear that the *Lightning* must have been S. of the mid-channel. Instead of following the old rule, the latter vessel determined to act upon the new rule, and ported her helm without any necessity: if one vessel was to the N. of the channel, and the other to the S., there could have been no risk of collision.

DR. LUSHINGTON (addressing the same Trinity Masters).—It is expedient that I address to you a very few observations respecting the rule which has been the subject of so much discussion. With regard to the rule itself, it emanates from the authority of the Trinity House, and although it may not constitute law *per se*, yet it effects this purpose—that if any steam-vessel, after this rule had been so promulgated as to be generally known amongst vessels of that description, should think fit not to comply with it, this Court would hold its crew guilty of unseamanlike conduct, and throw upon it all the consequences of not following the rule. It is fit that it should be distinctly understood, that such will be the binding effect of any such rule promulgated by the same authority. The rule appears to be drawn with very great precision, and is capable of being distinctly understood without any difficulty. It states that, “When steam-vessels, in different courses, must unavoidably and necessarily cross or near, that, by continuing their respective courses, there would be a risk of collision, each vessel shall put her helm to port, so as to always pass on the larboard side of each other.” I apprehend the true meaning of the rule to be this: that wherever two steam-vessels are approaching each other, and there is a reasonable chance of a collision—not that collision would be unavoidable, but where there is a reasonable chance of collision—then it is right that the rule should be

put into force. On the other hand, if there is no reasonable chance of collision—if the two vessels be so wide apart in their course that there is no reasonable chance of their coming together,—it would be an absurd explanation of the rule to say that they are to cross their course without any motive for so doing.

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Duke of Sussex.

Entertaining that opinion of the rule, let us look at the The defence.
circumstances of the present case, and see upon what the defence is bottomed. It is bottomed on two grounds: first, on

alleged custom; and, secondly, that the circumstances of the case were such that the rule does not apply; or, in other words, the vessels were steering a course so wide apart, that there was no occasion, and it was not fit, to resort to the rule. With respect to the custom, it is alleged to be as follows.

The custom,

Where a steam-vessel is going down the Thames, with the tide ebb, the tide sets so much more strongly to the northern shore, in that particular reach, that she is accustomed to take that side of the river, and keep as close to the northern shore as she can. On the other hand, it is said

that a vessel coming up the river, in similar circumstances, would keep to the south. This is said to be a custom; mere

convenience.

but, in point of fact, it is neither more nor less than common sense, that when no obstacle intervenes, the vessels wishing to avail themselves of the tide go where it is strongest, and others go where it is weakest. But supposing these two vessels to have been coming "end on," I distinctly lay it down as my opinion, without reference to nautical knowledge, that, under these circumstances, the rule ought to be observed, and no such custom is in force; that if these two vessels were coming "end on," and there was a risk of collision, then, notwithstanding it is more convenient for a vessel going down the river to go to the north, and

a vessel coming up to go to the south, still that convenience must give way to the rule. Were it otherwise, this would

which must give way to the rule.

be the necessary consequence: those on board steamers would always be considering, in their own mind, whether there were not circumstances which enabled them to avoid the rule; there would be no certainty, and, for the sake of

Nov. 4. a little more convenience or expedition, the rule would be set aside, and be no rule at all.
Duke of Sussex.

With respect to the last part of the case, I must rely upon your judgment, viz. whether the two vessels, when they came within sight of each other, were sailing, the one so far to the south, and the other to the north, that it was a matter of absurdity on the part of those on board the *Lightning* to port the helm and cross the mid channel for the sake, as it were, of courting a collision. If you think that there was any reasonable probability of collision, then the rule ought to be enforced, and the *Lightning* did right and the *Duke of Sussex* wrong.

OPINION.

THE TRINITY MASTERS.—The *Lightning* was in the middle of the river, being obliged to give way to the colliers, and we think that, by pursuing her course, collision might have been apprehended. The *Lightning* adopted the course which it is wished may become law, and the *Duke of Sussex* was, therefore, wrong.

Damage pronounced for.

DR. LUSHINGTON.—I pronounce for the damage.

Prerogative Court of Canterbury.

NOVEMBER 6.

An attested paper, not signed in the presence of the witnesses, nor the signature acknowledged, and not stated to be a will (the signature being seen by one witness), refused probate.

IN THE GOODS OF MARY HARRISON, SPINSTER, DE.
 —*Motion.*—The deceased died 28th September, 1840. On the 22nd or 23rd, she came into a room where two persons were at work, and obtained their signatures to a paper which she had in her hand, not stating it to be her will, nor shewing or acknowledging her signature. The same day, she brought another paper into the room, telling one of the persons (M. P.), who had signed the former, that she had written her name so badly, that she required her signature again. She then carried the paper to two other persons, and desired them to put their names to it, without saying what the paper was, or shewing or acknowledging her signature, or stating that it had been signed by her. The paper was so

folded up that the witnesses could see only the bottom of it, but one of them (M. P.) deposed that she observed the deceased's signature written. The paper was found, after her death, in the deceased's bed-room.

Nov. 6.

Harrison, dec.

Jenner, D., in support of the motion for probate of the latter paper.

SIR H. JENNER.—It is clear that the paper was not signed in the presence of the witnesses; the question is, whether the signature was acknowledged in their presence: I think not. Suppose M. P. saw the name, the other witnesses depose that they did not see it; would this be a sufficient acknowledgment of the signature in the presence of two witnesses, present at the same time? I think not. I think this paper was not signed, and that the signature was not acknowledged, in the presence of witnesses. The Court cannot on motion decree probate of this paper.

Not signed,
or signature ac-
knowledged, in
presence of wit-
nesses.

Motion rejected.

Rejected.

IN THE GOODS OF GEORGE LISSANT OLDING, DEC. — *Motion.* — The deceased, in this case, prepared his will, and, on the 18th September, 1841, in the presence of two witnesses, took it up, and requested them to attest it, telling them they had better sign their names then. They accordingly subscribed the paper, and after their names, the deceased signed his own name. The attestation-clause purported that the instrument had been signed and delivered in the presence of the subscribed witnesses.

A paper signed
after attesta-
tion, though in
the presence of
the witnesses,
refused pro-
bate.

Haggard, D., moving for probate. Perhaps the deceased thought that, as the signature was to be "at the foot or end," it should be at the very conclusion of the will. The body of the will was complete before he asked the witnesses to attest it, and they attested it at his request. [PER CURIAM. Is it a will before it is signed? They were requested to attest his "will." It looks as if done for the very purpose of raising a difficulty.] This is not likely from the character of the deceased: he probably thought that the "end" meant the end of all things. There can be no

ARGUMENT.

It is signed
at the conclu-
sion.

PER CURIAM.

Is it a will before it is signed? They were requested to attest his "will." It looks as if done for the very purpose of raising a difficulty.] This is not likely from the character of the deceased: he probably thought that the "end" meant the end of all things. There can be no

Nov. 10.

Scale v. Veley

Motion for a decree against the parishioners to shew cause why rate should not be confirmed.

All church-rates should be confirmed.

Monition to shew cause a proper proceeding.

JUDGMENT.

Headcorne case abandoned.

No precedent for present course in modern times.

If no appearance to decree, whether all objections to the rate would be closed.

to be cited to shew cause why the rate of 2s. in the pound, so made, in obedience to the monition, should not be confirmed. The rate had been made by the churchwardens and the minority of the rate-payers, in compliance with a suggestion from a high quarter—Lord Chief Justice Tindal. [PER CURIAM.—It was not decided.] No, but it was suggested, and I mention it as a ground why the parishioners should be cited to shew cause why the rate should not be confirmed. Rightly and properly, all church-rates should be confirmed; this is stated by Archdeacon Prideaux† and others, and it was recommended by Sir John Nicholl in the Stanmore case,‡ as a proper mode of proceeding, to take out a monition against the parish to shew cause why the rate should not be confirmed.

DR. LUSHINGTON.—I have followed hitherto exactly the steps of Sir Herbert Jenner in the other case, and I was prepared to adopt what he should do; but I find that that case stands still. Has Sir Herbert Jenner been moved to confirm the rate? [*The Proctor*.—No; the churchwardens in that case would be compelled to incur expenses on their own responsibility, and they have declined to do so.] If there was any probability that the other case would be decided, I should not like to decide this. [*The Proctor*.—The Headcorne case has been struck out of the book. The churchwardens could not be prevailed upon to go on with the suit. In the present case, the churchwardens are going on with the suit.] The difficulty I feel is this: I am afraid we are going to complicate a matter which is exceedingly difficult *per se*. I am not aware that there is any precedent in modern times which sanctions the course now pursued. I apprehend that, whether a rate be confirmed or not, you might sue for it in these Courts. But, in the first place, suppose a decree were now to issue and be returned, and no appearance were given, would confirmation of the rate produce the effect of closing all objections to it? In the next

* Judgment in the Exchequer Chamber, 8th February, 1841, in *Burder v. Veley and Joslin*.

† *Dir. to Churchwardens*, § 52.

‡ Opin. on case. But see *Knight and Littlejohns v. Gloyne*, 3 Add. 33.

place, can I confirm the rate, under the circumstances? Nov. 10.
 Now I am ready to confirm the rate *instantly*, and will it *Scale v. Voley.*
 not be better that the rate should be confirmed, and that Confirmation
 then you should sue for it, and then will come the question of rate recom-
 (which must come sooner or later), whether a rate made by mended; suing
 the minority is good or not? But I should consider the for it will raise
 whole question hereafter, for I entertain considerable doubt the question,
 whether at this time I could conclude the whole body of good whether a rate
 the parishioners. But I have no objection to confirm the by minority be
 rate; I consider it the ordinary course.

(This was assented to, and the rate, which did not shew Rate con-
 upon the face of it that it was made by the minority, was firmed.
 formally confirmed.)

Archers Court of Canterbury.

NOVEMBER 11.

FIFE v. BLUNT.—Appeal.—Cause.—This was originally Subtraction
 an appeal from the Commissary Court of Surrey, in a suit for of tithes.—The
 subtraction of tithes, by the Rev. Henry Blunt, Rector of owner of the
 Streatham, against Mr. Henry Fife, tenant and occupier of crops, at the
 a farm in that parish, called the Bridge House farm, in the time of sever-
 years 1837 and 1838. It appeared that Mr. Blunt became ance, liable to
 the Rector in 1835; that a person named Thomas Dean was the parson.
 then lessee and occupier of the farm; that Mr. Blunt ob-
 tained no tithes for 1835 or 1836, some time in which lat-
 ter year Dean became insolvent, and Mr. Fife became occu-
 pier of the farm, cultivating it, and paying the taxes assessed
 upon it; but it appeared from some of the receipts that he
 rented the farm up to 1838 not in his own name, but in that
 of Dean; that, in 1839, Mr. Fife became actual lessee of
 the farm, and upon application to him for payment of
 the tithes of the two preceding years, he alleged that Mr.
 Blunt had no claim upon him for them, because he was not
 lessee of the farm in 1837 and 1838, though he had pur-
 chased for five years the crops growing or to grow on the
 land, and in 1837 he went to reside at the house. The

Nov. 11.
Fife v. Blunt.

Allegation setting up this defence was rejected in the Commissary Court, whereupon the defendant appealed to this Court, which rejected the appeal, and affirmed the sentence with costs, retaining the cause.* The costs being unpaid, a writ *de contumace capiendo* issued against the defendant, who, in July, 1841, was imprisoned till the costs were paid. It was proved that, in 1837 and 1838, the defendant cropped in each year ninety acres of arable land, the tithes of which were valued at £50, £45, or £40; and thirty acres of meadow or grass land, the tithes of which were estimated at £25, £20, or £15; that he severed and carried away barley and oats, without setting out the tithes, which rendered him liable, under the statute,† to double the amount of the tithes.

ARGUMENT.

Defendant, as holder of the crops, liable for the tithe.

Addams, D., for the respondent. The defendant (appellant) being in fact the tenant and occupier of the farm, and, by his own admission, the holder of the crops, is liable for the tithe: his ground of opposition is founded on an entire misapprehension. Mr. Blunt leaves the case in the hands of the Court, and will be content with the minimum single value of the tithe.

Defence,—he did not occupy, only managed, the farm.

The Defendant (who appeared in person) said he did not occupy the farm till 1838; he only managed it for Mr. Green. [PER CURIAM.—Did you not sever the crops?] I did not. [PER CUR.—It appears in the evidence that you did.] All the demand made of me by Mr. Blunt was for £42, at 7s. an acre, paid by the other occupiers in the parish. [*The Proctor.*—I am content to take £42.]

JUDGMENT.

Answers of defendant to Libel, unsatisfactory, and fuller answers not given.

Proof of occupation from 1836;

SIR H. JENNER.—The evidence before the Court consists of the personal answers of the party to the Libel, and the depositions of four witnesses who have been examined thereon. The answers of Mr. Fife were not satisfactory, and the Court directed him to give further and fuller answers; but this he has not done, and the Court, therefore, has not the benefit of these fuller answers of the party. The witnesses examined in support of the Libel prove that Mr. Fife occupied and was assessed for the land in question, 120 acres, from 1836 to the present time; that he claimed exemption

* See 7 *Monthly Law Mag.*, 131.

† 2 & 3 Edw. 6, c. 13.

from the tax upon a dog he kept to look after sheep; and that he complained to the collector of the parochial rates that he was assessed for more land than he occupied, thereby admitting he was an occupier. The notion of Mr. Fife that he is not liable for the tithe because he only cultivated the farm, and took the crops, and was not the actual lessee, is a misapprehension of the law.

Nov. 11.
Fife v. Blunt,
and admission
of defendant;
who has mis-
apprehended
the law.

Under these circumstances, I am of opinion that the farm (to the extent of ninety acres of arable land, and twenty-eight acres of meadow land) was occupied by Mr. Fife. Mr. Blunt has liberally consented to accept £40 for the former and £15 for the grass, making £55 a year, and accordingly I pronounce for that value of tithes due to Mr. Blunt and subtracted by Mr. Fife, namely, £110; and I am bound to condemn Mr. Fife in the costs in both Courts occasioned by his resistance to this demand—this moderate demand—on behalf of the Rector.

Tithes pro-
nounced for,
with costs.

On the fourth session of the Term, the Proctor for Mr. Blunt porrected his bill of costs, taxed at £58. 5s. 4d. Mr. Fife appeared, and, alleging that he had in due time and place appealed, retired. The Court directed that he should prosecute his appeal by the first day of the next Term: the party refused to come into Court, when called by the officer of the Court, to hear the assignation.

Further pro-
ceedings.
Dec. 1.

Addams, D., on behalf of Mr. Blunt, observing that it was not probable that the appeal would be prosecuted, applied for a monition to enforce the payment of the costs, under 32 Hen. 8, c. 7, by which the Court was empowered to enforce the payment of costs, notwithstanding the appeal.

Dec. 11.
Motion for a
monition to en-
force costs, not-
withstanding
appeal, under
32 H. 8, c. 7.

The party did not appear by Proctor or in person.

SIR H. JENNER.—I agree in opinion with the Counsel that, looking at the circumstances of the case, the appeal is merely for the purpose of delay, and, under the authority of the stat. 32 Hen. 8, c. 7, the Court would feel inclined to grant the prayer of Mr. Blunt, but that this is not a proceeding under that statute, but under the 2 & 3 Ed. 6, c. 13, which gives double the value of the tithes and costs, to be recovered in the usual course of ecclesiastical law.

JUDGMENT.
Appeal for
sake of delay.

Not a pro-
ceeding under
32 H. 8, but un-
der 2 & 3 Ed. 6.

Nov. 11. [Addams.—The 2 & 3 Ed. 6, c. 13, has a special reference
Fife v. Blunt. to 32 Hen. 8, c. 7.] But the proceeding is under the former statute, for the double value of the tithes, with costs, not to recover the single value. Therefore, I do not think I am authorized to grant a monition under the 32 Hen. 8, and an under the necessity of rejecting the motion.*

Motion re-
 jected.

* The following note (*penes Editorem*) of a Judgment by the late Sir John Nicholl, in the Arches Court, 8th July, 1834 (hitherto unreported), may be introduced here.

1834.
Melhuish v.
Facey. MELHUSH v. FACEY.—This was originally a suit for subtraction of tithes in the Consistorial Court of Exeter (where the citation was returned in October, 1832), from whence it was appealed to the Arches Court. The Libel claimed a sum of money due for tithes for the years 1830, 1831, and 1832. The Allegation of the defendant pleaded that there had been a composition of £12. 1s. 6d. several years before; that no notice had been given to put an end to it; that the composition had been paid down to Lady-day, 1830; that an agreement for a new composition of 2s. 6d. in the pound was made, 4th January, 1831, on a new valuation; and that the defendant was ready to proceed to the new valuation, but that nothing was done on the other side. The case came on for hearing 21st February, 1833, when the Judge in the Court at Exeter dismissed the defendant, and condemned the plaintiff in the costs. Notwithstanding the appeal, the costs were taxed, and steps taken to enforce the payment of the taxed costs, after the service of the inhibition.

JUDGMENT.

SIR JOHN NICHOLL.—Several questions seem to have arisen in the case, and points which cannot be determined without some difficulty. I am aware that the Judge in the Court below is a person of considerable talent and caution, and therefore, if I find it necessary to differ from him, it will be with great deference to his opinion: but still the Court is bound, on an appeal, to be guided by its own judgment in the matter.

Upon the face of the proceedings, there is one fact very clear, the tithes have been due and not paid; whether they be due in kind, or whether their value is to be ascertained by agreement between the parties, still, whatever is due has not been paid. None is understood to be due for 1830; there is no proof of any having been paid; although it is alleged on one side, it is denied on the other. But titheable matters of considerable amount arose in 1830, again in 1831, and again in 1832. Now the tithes so due have been taken by the defendant; he has retained the ten parts, nine only belonging to him (the other part belonging to the incumbent), which he has not in any manner accounted for, either by rendering the tithe, or by paying any sum of money as the value of the tithe. If he sets up a defence for this,—a proceeding
 against

High Court of Admiralty.

NOVEMBER 12.

THE "ELIZABETH AND JANE."—*Motion*.—In June, 1841, on a motion in behalf of Jane King, widow, and Geo. Bourne, executors of the late John King, who, whilst alive, was owner of thirty-two sixty-fourths of the vessel, the Court, on affidavit, decreed the usual warrant to arrest the vessel till bail should be given to answer for her safe return to the port of Southampton. The warrant was returned,

Possession.—
The Court has not jurisdiction to alter possession, under any circumstances, at the suit of only an equality of the interest.

against good conscience,—against the payment of what he legally owes, in some shape or other,—such a defence must be clearly made out. Now, two defences are relied on;—one, that there was an agreement existing previous to 1830; secondly, that there was a new parol agreement on the 4th January, 1831. Of common right, there can be no doubt that tithes in kind are to be set out; and, unless there is some agreement between the parties, to ascertain and accept a payment in lieu, tithes in kind are what are due. Now, here is a composition, in the first place, set up, and no notice on either side to determine it: and it appears to me that the Court must, in some degree, consider whether a composition was existing at the time of the commencement of this suit, or at the time of the alleged new agreement, in January, 1831. Was that parol agreement, of January, 1831, binding on the parties? If not, has not the proprietor of the tithe, the parson, who is the owner of the tenth part, a right to sue for the value of the tithe, and to call upon the other party to account for that value; and, if there has been any understanding as to what is to be considered as the value, is not this Court entitled, in justice and equity, to pronounce for the amount of tithe, in substance and form, to be considered with some degree of caution in drawing up the sentence?

Now, in dealing with the justice of the case, as to the first point, whether there was any existing composition between the minister and Mr. Facey, I cannot help thinking that there is strong presumptive evidence to entitle the Court to conclude that there was an understanding between the parties as to what should be paid by the defendant in lieu of tithe in kind: for, in the first place, the rector appears to have agreed to a composition with all the parish,—if a composition it can be called, which was an agreement as to the value of the tithes; and as to the lands of Muckerly, there appears to have been a composition in lieu of tithe paid by the father of Mr. Facey, and from the tenant of Mr. Facey,—if the minister knew who the tenant was in 1828 and 1829; but it is with Mr. Facey junior that the minister settles the account;

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and

Nov. 12.
*Elizabeth and
 Jane.*

duly executed ; the four defaults were granted, and a motion was prayed against Mr. Tier, the owner of the other thirty-two sixty-fourths, to appear and shew cause why possession of the ship should not be decreed to Jane King

and here is a paper delivered by him, in November, 1829, charging him with the sums due,—£10 due Lady-day, 1829,—and claiming the amount of tithes to Lady-day, 1830. Under these circumstances, and there being no notice given that, in future, the tithes should be set off in kind, and that no money payment, or agreement, would be accepted in lieu of tithes, I apprehend that there was an understanding between the parties, and consequently that the value of the tithes, at the rate of £12. 1s. 6d., ought to have been paid, and was due up to this time unless it can be shewn that there was a different valuation agreed upon between the parties. And I am, therefore, disposed to hold that the learned Judge in the Court below did wrong in dismissing the defendant altogether, and in condemning the plaintiff in the costs. The defendant has not done what was agreed upon between himself and the plaintiff: and the Court is at liberty, where the suit is brought for the tithes themselves, and where there is an agreement between the parties on the face of the evidence in the Court below, to take the amount due as the value of the tithes, and to pronounce accordingly. Therefore, in the first place, I pronounce for the appeal, and reverse the sentence appealed from; I pronounce that tithes are due to the incumbent for the years libellant, and refer it to the Registrar to ascertain the value of the tithes, not according to the quantity and value, as set down in the schedule, but according to the implied agreement between the parties during this period of time.

In regard to what passed at the meeting of the 4th January, 1831. I concur in opinion with the learned Judge in the Court below; for the very circumstance of his excepting the costs on the second article of the Allegation, shews that he did not think that article proved, or that what occurred at that meeting superseded the prior agreement, and put an end to the former composition: and as a new agreement, it could be valid only for one year; but I doubt whether it could be valid at all. A parol agreement for tithes is not valid under the Statute of Frauds; for, under that statute, no such agreement as to hereditaments,—and tithes are hereditaments,—has any validity. At all events, a mere parol agreement can have existence only for a year, and therefore only for the year; and supposing it to be good for one year, and that the tithes, according to that agreement, was due for the previous crops, there were crops subsequently arising, and so something must be due as tithes in kind. But it would be injurious to the parties to take such a view of the case, and would carry them into further litigation. So, in concurrence with the opinion of the Judge in the Court below, I shall hold
 the

and the other executor, under the following circumstances: Mr. Tier, being in possession of the vessel, which lay within sight of his own house, had caused her to be dismantled, and she was lying high and dry on the beach, in a condition to become every day deteriorated, and would neither employ her nor adopt any measures for the mutual benefit of the owners of the vessel.

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Jane.

Bayford, D., in support of the motion. We now ask for possession of the vessel, in order to preserve the property. There are authorities in favour of the position, that parties with a moiety of interest in a ship have the same remedy as a majority of interest. Godolphin.* Molloy.† In the *Egyptienne*,‡ Lord Stowell, although he refused possession, granted a monition to shew cause why possession should not be given: the monition was not extracted, and the case dropped.

Nov. 4.
ARGUMENT.

Authorities.

DR. LUSHINGTON.—I have considered with some pains whether I am competent to afford the remedy prayed. In the first place, it appears to me that, if I had power to decree that possession of the vessel should be given up to the widow and the other executor, who are owners of a moiety, upon the ground that the vessel is not to be employed, and is in a state of deterioration, a similar application might be made with respect to the owners of less than a moiety; because the very same reason would apply, with equal force, to the owners of a very small interest as to the possessors of that the agreement of the 4th January, 1831, is not substantiated in point of fact and in point of law.

Nov. 12.
JUDGMENT.

Reason will
apply to a minority of interest.

The sentence I propose to give, therefore, is that which I have already mentioned; and with respect to costs, I am very much disposed to leave both parties to pay their own costs in the Court below, for both the parties seem to have lost their way as to the course of proceeding. But, under the sentence of the Court below, the appellant was compelled to come here, and, therefore, he is entitled to the costs of appeal, without taking any notice of the costs in the Court below. The Court pronounces for the appeal, reverses the sentence, and retains the principal cause, referring it to the Registrar to ascertain what is the amount of the value of the tithes, according to the implied agreement between the parties.

* *Introd. to View of Adm. Jurisdiction.*

† B. 2, c 1, § 3.

‡ 1 Hagg. A. R. 346, note.

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*Elizabeth and
 Jane.*

Jurisdiction
 denied to this
 Court.

a moiety. Circumstances similar to these must have occurred upon former occasions, but it does not appear that in any previous instance has the process of this Court been enforced for the purpose for which it is now prayed; and, unless I was prepared to go the whole length—if this motion to shew cause were to issue, and no sufficient cause were to be shewn, unless I was prepared to follow it up by an attachment, it would be erroneous on my part to threaten, when I could not carry the threat into effect. Now, having looked at all the authorities on this subject which have fallen within my cognisance, it appears to me that this jurisdiction is denied to the Court; that the only case in which this Court can interfere in what may be termed a cause of possession is, where a majority of interest is vested in the person applying, and where disputes arise among part owners. I think it appears from Lord Tenterden's book,* that in these cases the sole remedy must be found in Courts exercising a different jurisdiction.

Objection *ab
 inconvenienti.*

For these reasons, I am under the necessity of declining to grant the motion prayed; and I may further observe, as an additional reason against so doing, that if the Court were to attempt to exercise this power, I should have to consider the particular grounds on which the motion is founded, and have to determine whether this or that voyage was the most beneficial for the owners, or whether it was expedient to run the chance of a more advantageous voyage. I am satisfied

Motion re- cannot grant this motion.
 fused.

Wages. — THE "DUCHESS OF KENT."—*Summary Petition.*—The was a suit for subtraction of wages by Henry Stokes, chief mate of the vessel, who was shipped for a voyage from London to Australasia, the East-Indies and back, at £5 per month, and he signed the usual articles. The vessel sailed in December, 1839, arrived at Port Phillip on the 18th June, 1840, where part of her cargo was unladen; then proceeded to Sydney, discharged the rest of the cargo there; then sailed to Moulmein, in the East-Indies, and returned

Payment refused on the ground that part of cargo embezzled through mariner's misconduct.—A chief mate, though bound to exercise vigilance in preserving the cargo, not responsible for all

* *Shipp.* p. 1, c. 3.

to London on the 3rd August, when the master refused to pay Stokes the balance of his wages, amounting to £32, alleging that a part of the cargo had been embezzled through his misconduct. The mariner, in his Summary Petition (the only plea in the cause), in stating his services, alleged "that, during the outward voyage, the vessel was without any bulk-heads or locks on her hatches, and in consequence, her crew had free access to the hold where the cargo was stowed; that, upon discharging part of the cargo at Port Phillip, it was discovered that two cases, containing shoes, gin, rum, flour, and other articles, had been purloined by the crew, part of such rum being found in the carpenter's chest; and upon its being apparent that the master was endeavouring to bring to justice the parties concerned in such plunder, eight of the crew, including the second mate and carpenter, there absconded."

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embezzlements and robberies. —Wages pronounced for, because the loss not proved to have been owing to his neglect.

Sir J. Dodson, Q. A., for the mariner. The party is entitled to his whole wages, unless he is proved to have been a party to the plunder. The point in question is, whether this man is responsible for a loss which was not his own act. The true principle of the law is stated by Lord Tenterden: * "If the cargo be embezzled or injured by the fraud or negligence of the seamen, so that the merchant has a right to claim a satisfaction from the master and owners, they may, by the custom of merchants, deduct the value thereof from the wages of the seamen by whose misconduct the injury has taken place." But "an innocent person is not liable to contribute a portion of his wages to make good the loss occasioned by the misconduct of others." *Thompson v. Collins*.† In the "*Prince Frederick*,"‡ those persons only who were personally implicated in the offence were held responsible, notwithstanding there was a clause in the articles to the contrary.

ARGUMENT.

Party not liable for loss, unless personally implicated in the fraud;

notwithstanding a clause in articles.

Addams, D., for the owners. From the statement of the man himself and the evidence of his witnesses, he is clearly responsible for the property subducted from the ship at Port Phillip, the value of which considerably exceeds the

* *Shipp*, p. 4, c. 3.

† 1 Bos. & Pull. N. R. 347.

‡ 2 Hagg. A. R. 394.

Nov. 12. balance of his wages. It is the especial duty of a chief mate to look after the cargo, and he is responsible for any loss. The vessel had hatches, though not bars; but the cargo was battened down, and covered with tarpaulins. The crew were unruly and insubordinate, and the master had no assistance he ought to have had from the chief mate.

Especial duty of chief mate to look after cargo.

JUDGMENT.

DR. LUSHINGTON.—Whatever may have been the conduct of the mariner, it was not of such a nature that the master deemed it necessary to dismiss him; he continued on board the vessel, and, save during a few days' suspension, was allowed to fill the office of chief mate; he must, therefore, be considered as entitled to his wages, unless facts are proved which, according to the known principles of the law, would deprive him of his claim.

The mariner suffered to do duty during whole voyage.

The statement in the Summary Petition, of the want of bulk-heads, and securities to prevent the access of the crew to the hold, was introduced, I apprehend, with a view of forestalling the defence which would probably be set up on the part of the owners; and upon this Summary Petition all the witnesses, except one, who could be examined, have been examined, and cross-examined also. I will not say that this course of proceeding may not, under certain circumstances, be justified; but I must observe, that it does impose a very considerable difficulty on the Court; for, instead of the matter being alleged substantively as a defence to the claim of the mariner, it is incidentally stated in the course of the mariner's case, and accompanied by other circumstances which are intended to take off its force, and to deprive it, in fact, of any operation: I may add, further, that various interrogatories have been addressed to the witnesses (not improperly, but, on the contrary, with great propriety) as to the general conduct of this mate with regard to the performance of his duty—with regard to his insubordination to the master, and his indulgence in spirituous liquors. But, not being alleged in any plea—and they do not come in any part of the Summary Petition, and have not been set by a direct issue in the cause—I should doubt very much whether, except in complicated cases, I could rely upon a defence set up by the owners, of a charge of drunkenness

Inconvenience occasioned by want of a defensive plea.

and general neglect of duty, unless it was pleaded. But I do not think that this case will turn upon an issue of that description; the true issue lies in a very narrow compass.

The person now suing was bound to discharge all the duties which belong to the station of chief mate; and amongst those duties, one of the most important was, that he should exercise great vigilance and attention for the preservation of the cargo against attempts at robbery or embezzlement. I wish to express myself as correctly as I can on this point. I say, that was his business; but I cannot go the length of saying, when it is contended (though I do not mean to say it is in the present case) that the mate is responsible for all robberies and embezzlements on board a vessel, I think that degree of responsibility attaches to him. I think he is bound to exercise due care, vigilance, and caution; and if, notwithstanding, embezzlement or robbery is committed, without his knowledge, or participation, or reasonable means of preventing it, then he is not responsible for the consequences. Were it otherwise, a chief mate would be fixed with a responsibility which scarcely any person could bear; he would be required to exercise vigilance day and night to such an extent as entirely to prevent robbery. I conceive that a mate may forfeit his wages in one of two ways—either by a general neglect of duty, or by a particular neglect of duty, which would lead, or which might lead, to embezzlement or robbery by the crew.

With regard to the general neglect of duty, it is certainly not averred that the whole of his conduct throughout the time he was on board the vessel was of that character; and unless there could be brought against him a charge of so conducting himself at the time this embezzlement took place, there cannot be any forfeiture at all. I do not think that occasional acts of intoxication, or, indeed, any other of the charges preferred against him, establish a general disregard of duty, and therefore I come to the remaining part of the case—whether he so neglected his duty that he allowed a robbery to take place, which otherwise would have been prevented.

A good deal of discussion has occurred as to the state of

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Duchess of Kent.

Care of the cargo one of duties of chief mate.

Not responsible for all embezzlements.

Forfeiture of wages may be incurred by general or by particular neglect of duty.

General neglect not established.

Nov. 12.

Duchess of Kent.

Conduct of the mariner at Port Phillip.

Mere neglect, in a particular instance, not followed by injury to owners, does not work a forfeiture.

No proof that the loss occurred in consequence of the mate's neglect.

the bulk-heads, and as to the means which were, or ought to have been, adopted for the preservation of the cargo against ill intentions on the part of the crew. I am not aware that it is necessary for me to solve that question. So far as the evidence goes, I should be inclined to hold, that this vessel scarcely had the ordinary protection against embezzlement by the crew. Therefore, if the point turned entirely upon this question, I should hold the mate to be exonerated from any consequences arising from this embezzlement. But there is one part of the case which has pressed upon me with great weight, namely, the circumstance of the mate during the time of the unloading of the cargo at Port Phillip, having gone on shore, in spite of the orders of the master, and having been absent for a considerable period. I can entertain little doubt that, by so doing, he was guilty of negligence, and exposed the cargo to a risk of being secretly plundered, and carried away,—to a risk which, under very many circumstances, would render him liable. But I am not prepared to say that the mere circumstance of having exposed the cargo to a risk, unless it could be shewn that, in consequence of that risk, actual embezzlement or plunder of the cargo took place, would work a forfeiture of wages. I am not aware of any principle of law which, for a mere neglect of duty in a particular instance, unless followed up by consequences injurious to the owners, would deprive the mate of his wages.

Then the question narrows itself to this single point—whether there is sufficient evidence to induce me to hold that, during his absence, on the night in question, at Port Phillip, the plunder, which seems to have taken place, actually did occur. Now, I am of opinion that the owners, who claim a forfeiture of wages, are bound to establish this part of the case. I do not say that it is necessary to do so in all cases by positive and direct evidence, but they ought to do so by testimony which would lead fairly to the presumption that, on the night in question, the robbery did actually occur.

But, looking at the evidence, I find the accounts given by the witnesses altogether discordant; I find the plea saying one thing, and the evidence of the witnesses another; for the

plea states, "that, upon discharging the cargo, it was discovered that two cases, containing shoes and gin, had been purloined by the crew; and upon its being apparent that the master was endeavouring to bring to justice the parties concerned in such plunder, eight of the crew, including the second mate and carpenter, absconded,"—which would make the discovery to have preceded the absconding of the crew; whereas I find, on looking at the evidence, that part of the crew absconded prior to the discovery of the plunder, and part of them afterwards. I do not think, then, that this evidence leads me to any safe conclusion that the robbery took place upon the night in question; and, being of that opinion, I cannot, with justice, fix upon the mate the responsibility of the loss. The consequence is, then, that I am under the necessity of pronouncing that the defence has failed, and, consequently, for the wages.

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Duchess of Kent.

Defence has failed.

 NOVEMBER 24.

THE "ALEXANDER."—*Act on Petition.*—This was an action brought by Wm. Michelson, an anchor-smith, under the stat. 3 & 4 Vict. c. 65, to recover the price of an anchor and chain-cable furnished to the *Alexander*, a foreign ship, in the river Thames, in 1835. The vessel having been arrested, the owners (the same parties who owned the vessel at the time the debt was incurred) appeared under protest, alleging that the 6th section of the statute (which passed on the 7th August, 1840) had not a retrospective effect, and that this Court had no jurisdiction over the subject-matter of a claim which arose in 1835.

A foreign ship sued under stat. 3 & 4 Vic. c. 65, for necessities supplied in 1835. — The new jurisdiction conferred by the statute takes up all past cases; but must be exercised equitably. — The statute, being remedial, must have a liberal construction.

Jenner, D., for the owners, in support of the protest. In 1835, this Court had no jurisdiction in this matter. Prior to the statute, material men, without possession, had no *lien* on the ship, and could not proceed against the ship *in specie*. It is a rule of law, that *nova constitutio futuris formam imponere debet, non præteritis*.* If a retrospective effect be given to the 6th section (the 3rd being evidently prospective), it may affect titles acquired before the passing of

Nov. 12.
ARGUMENT.

The 6th sect. has not a retrospective effect;

* 2 Inst. 292.

Nov. 24.

Alexander.

which would
affect pre-exist-
ing titles.

the Act. In the case of a mortgagee, not responsible for money laid out on the vessel, it would convert the *actio in personam* into an *actio in rem*, and give material men a preference over simple-contract creditors. The vessel might have been sold in 1835 free from all liability. Suppose the owner had purchased it, without *lien*, in 1840, is he by this Act rendered liable for all intermediate claims for necessities? The vessel may have passed through various hands, and some of them may have become insolvent. The Courts have always endeavoured not to do injustice by giving statutes a retrospective effect.

Authorities.

[Authorities cited: *Gilmore v. Shuter*;* *Wilkinson v. Meyer* ;† *Couch v. Jeffries* ;‡ *Towler v. Chatterton* ;§ *Freeman v. Moyes*.¶]

PER CURIAM.

PER CURIAM.—Unless you shew that there is an injustice in applying the law to this case, you shew nothing. The Act only gives this Court jurisdiction to entertain such questions; but this Court will administer it in equity.

Addams, D., against the protest. I do not contend that the Act has a retrospective effect; it has a prospective operation only: "The Court shall have jurisdiction to decide all claims and demands whatsoever for necessities supplied to any foreign ship." Where it can be shewn that there would be an injustice in enforcing the claim, the Court will exercise its power equitably.

The jurisdiction sought to be put in motion is prospective; and will be exercised equitably.

Nov. 24.
JUDGMENT.

DR. LUSHINGTON.—It may be doubtful whether this is strictly a matter of protest; I think it is rather a plea in bar; but as the case may be conveniently disposed of on the present plea, I deem it necessary only to observe, that, in future, I wish it distinctly to be understood, that it is in virtue of the statute, that the Court is justified in taking cognizance of these cases at all; for though the whole subject-matter falls within the limits of the general maritime law, yet it is probable that, but for this statute, the Court might have been stopped by a prohibition, on the ground that the Common Law narrowed the general jurisdiction otherwise belonging to this Court, and forbade me to admi-

* Jones' Rep. 108 *et al.*† *Ld. Raym.* 1352.

‡ 4 Burr. 2460.

§ 6 Bing. 258.

|| 3 Nev. & M. 883.

nister the Law Maritime in this particular case. The prohibition, therefore, was taken off from the date of this statute; but I do not find in the statute any words limiting the power of the Court to adjudicate upon claims arising prior to the Act, but not preferred till after it had passed.

Nov. 24.

Alexander.

No words of limitation in statute.

It has been contended that this Court, by taking cognizance of claims which occurred before the passing of the Act, might do injustice; that other interests existing prior to the Act, perhaps acquired after the contraction of the debt, might be injuriously affected. But I apprehend this view of the case is not well founded, for many reasons. In the first place, the statute does not create a *lien* at all; yet it was upon the ground that the statute did create a *lien*, that the whole argument against the jurisdiction, or rather against the Court's exercising jurisdiction, under existing circumstances, was founded. The statute enacts, "That the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever for necessities supplied to any foreign ship, or sea-going vessel, and to enforce the payment thereof"—The Court "shall have jurisdiction." It simply gives the Court jurisdiction to be exercised in any and every lawful mode which the Court has the power of exercising. It might be done by arresting the person—if the person had been here; or by arresting the property. Secondly, the Court, having jurisdiction, would be bound to exercise it equitably, and would protect the interests of every person having *bond fide* a *lien* on the property, or subsequent purchasers without notice. And here I wish to draw attention particularly to the fact, that no *lien* whatever is established by the Act. Let it not be supposed that, in pronouncing for my jurisdiction, or exercising it on the present occasion, I hold in the slightest degree that a claim for wages contracted for by the ship four or five years ago could militate against subsequent owners. I give no opinion upon that point. It may be a question, which I am not now to determine, whether a ship, having *bond fide* changed hands, would be liable to any such demand.

Stat. does not create a *lien*.

Jurisdiction must be exercised equitably.

As to the general argument, I am not aware that, where a statute establishes a new remedy, new modes of suing must

Nov. 24.

Alexander.

Where a new jurisdiction is conferred, it takes up all past cases.

No injustice in this case.

Stat. being remedial, should have a wide construction.

arise after the Act has passed. I take the general principle to be quite the contrary; that where a statute is passed conferring a new jurisdiction, the new jurisdiction takes up all past cases, in which all the circumstances may have occurred prior to the passing of the statute and the establishment of the jurisdiction; and there is not the slightest injustice in that. It is evident, that if, in any particular case, unjust consequences might arise, it would be for the Court to consider whether, in such a case, this circumstance might not operate to prevent the creditors from recovering against the ship. In the present instance, as far as appears, there is the same foreign owner, and by the same general maritime law which prevails throughout Europe, the ship would be liable for necessaries supplied for her use; and there exists the same reason for this remedy, namely, the difficulty of suing an owner resident abroad. Moreover, the statute is a remedial statute, and ought to have a construction sufficiently wide to meet the mischief intended to be remedied; and this is clearly one of the mischiefs which the statute contemplated. I have referred to the cases cited, but none of them affect the merits of this case. In the first place, they almost all depend upon the peculiar wording of the statutes under consideration at the time those cases were decided; and it is obvious that the slightest alteration in the wording of a statute might make it retrospective or prospective only. Again, some of the cases refer not to actions brought after the passing of the statute, but to actions already brought prior to it which is a totally different thing. For example, executors having brought an action prior to the period when the statute passed, which subjects them to costs, undoubtedly it was a strong retrospective measure to render these executors subject to costs, though they were so rendered by a decision in a Court of Common Law, in obedience to the statute. But that is totally different from giving a remedy for an injury done prior to the statute, and no proceedings had commenced. I have looked at all the cases, and though, perhaps, there may be found in some of them that which it would be easy to explain—some words in some of the old writers, with regard to remedial statutes, that they should

not contravene the Common Law ; yet all common law authorities agree in the general principle, that a remedial statute shall have a liberal construction. The words of this statute give me jurisdiction ; if so, I am bound to exercise it ; and in the exercise of it, if facts should come out, shewing me that other persons have a just and equitable claim, which clashes with that preferred, I must administer the law in equity, and decide between them. I therefore overrule the protest, and assign the party to appear absolutely.

Nov. 24.

Alexander.

Jurisdiction pronounced for.

Protest overruled.

Prerogative Court of Canterbury.

NOVEMBER 26.

IN THE GOODS OF THOMAS CROSS, DEC.—*Motion.*—The deceased died 7th September, 1841, leaving a widow and a minor daughter, and possessed of considerable real and personal estate. Some weeks before the illness of which he died, when Mrs. Cross was with him, on his unlocking and opening a private drawer, wherein he kept, under lock, papers of moment and concern, she observed a paper in the form of a letter, sealed with three black seals, and supposing it to be his will, she asked him what it was, and he replied, "It is my will, but not for you yet, Harriet," and locked the drawer. On the 12th August, the deceased had a stroke of paralysis, from which he never recovered, and its effect upon his mind prevented his being questioned or applied to upon any matter of business. After this attack, Mrs. Cross found, in the aforesaid private drawer (amongst other papers of moment), the paper sealed with three black seals, which was endorsed, "Mr. Thomas Cross—private memor.," and began thus: "This written paper or memorandum is intended to be my last will and testament," and ended thus: "Witness my hand, this 22nd September, 1840, (this is my will);" and it was subscribed by the deceased, and duly attested by three witnesses. Mrs. Cross took and retained possession of the paper, with the seals unbroken, till the day the deceased died, when she broke the seals in

Alterations in a will, dated in 1840, without evidence as to date when made:—administration decreed with the alterations, on presumption.

Nov. 26.

Cross, dec.

the presence of another person, in order to ascertain whether there were any directions respecting the funeral. The several figures, interlineations, alterations, and erasures which the paper exhibited, were then observed; they were in the deceased's hand-writing, and his initials were placed against some of them; but there was no evidence as to when they were made. The three subscribed witnesses deposed that the will, and the alterations made therein, were in the deceased's hand-writing, and that when he executed the will, in their presence, the paper was folded over, so that neither of them could see the body or any part of the contents; and that they were, therefore, unable to depose whether the figures, alterations, and initials, were or were not in the will at the time.

MOTION.

Addams, D., moved for administration with the will annexed (there being no executor named), with the interlineations, alterations, and erasures. There was an obscure clause in the paper, by which a person therein named might be considered residuary legatee in trust, and therefore entitled to administration in preference to the widow; but he renounced, if entitled.

JUDGMENT.

SIR H. JENNER.—The difficulty of construing this paper will have to be considered hereafter; the present question is whether the paper is entitled to probate as it stands. The will is termed a "memorandum," as if the deceased intended to make some other paper. It bears the appearance of haste, and perhaps carelessness; but some of the alterations at least, must have been made before execution. As he did make alterations, and must have made alterations, while writing the paper, he probably made all of them at that time. When some of the alterations were made does not appear; but when I find that the deceased did make alterations, in writing the will, as he went on, the conclusion is, that all the alterations were made before execution, and before the paper was sealed up. Under these circumstances, the Court is bound to come to the conclusion—at least there is nothing to lead it to an opposite conclusion—that the alterations were made before the execution. Decree administration with the will annexed, as it now stands.

Appearance of haste.

Some alterations made before execution.

Conclusion, that all so made.

Administration with will as it stands.

Consistory Court of London.

NOVEMBER 29.

VARTY AND MOPSEY v. NUNN.—*Allegation.*—This was a suit for subtraction of church-rate, brought by parties alleging themselves to be churchwardens of the parish of St. John Hackney. The Libel, which was in the usual form, was admitted without opposition. An Allegation was now offered on behalf of the party sued responsive to the Libel. The heading of the rate purported that it was a rate of 2d. in the pound, made by the churchwardens and other inhabitants of the parish of Hackney, in the county of Middlesex, at a meeting, duly assembled, on the 23rd July, 1840, continued the two following days, for taking the poll, according to notice. The ancient parish of Saint John Hackney has been divided into three distinct parishes, under the Church Building Acts; portions being taken away from the ancient parish, of which the parishes of South Hackney and West Hackney have been formed, and each of these parishes selects its own churchwardens. The rate in question had been laid upon the old parish only, and the objections raised against its validity, in the Allegation and in the argument, resolved themselves into the following: 1st. That the rate was made by the churchwardens, and ought to have been made by the trustees, under the local Act, 30 Geo. 3, c. 71; 2nd. That it ought to have been over the whole ancient parish, instead of a part; 3rd. That the persons suing were not the proper churchwardens, and that no notice had been given, according to the provisions of the Vestry Act; 4th. That the churchwardens had, or might have had, funds in their hands, and therefore the rate was unnecessary; 5th. That although the occupiers were actually rated, at a proper amount, yet, as to a considerable number, the individuals were not called upon to pay the rate, but their landlords, and that at a reduced rate, under the local Act, which made the rate itself unequal. The amount sued for was 3s. 4d.

Addams, D., for the churchwardens, argued that the Allegation contained no answer to the Libel.

Church-rate. — Allegation, in opposition to the Libel, rejected. — Construction of a local Act, and of Church Building Acts. — It is no objection to the validity of a rate, that the churchwardens *might have* obtained funds from other sources: — nor that the rate, though assessed upon occupiers, is demanded of and paid by landlords: — nor that the rate is slightly unequal.

Objections to the rate.

Nov. 18.
ARGUMENT.

Nov. 29. *Sir John Dodson, Q. A.*, for the party cited, urged the foregoing objections, and
Varty v. Nunn. *Bayford, D.*, on the same side, suggested the following more general argument :

Principle of church-rates.

Church-rates rest upon custom, not upon any determinate fixed principle. The practice of parishioners paying a rate for the repairs of the church is contrary to the general ecclesiastical law, and to English law in analogous cases. The principle of the general ecclesiastical law is, that the repairs shall be defrayed out of the emoluments—that whoever has the *onus* should bear the *onus*. This is the common law of the land in analogous cases. In the case of a benefice, who is answerable for dilapidations? The person who enjoyed it. A party claiming a prescriptive right to a pew, must prove repairs. So in a case expressly stated by the common law judges as analogous to church repairs—the repairs of roads and bridges, by the parish and the county—that is, the persons who live nearest and have the enjoyment bear the *onus*. This principle was taken from the Canonists. By the civil law, the repairs of roads and bridges were defrayed out of the emperor's privy purse; and where the inhabitants of the provinces repaired them, they relieved the emperor of the burthen, and so when parishioners took upon themselves the repairs of the church, they relieved the bishop: but this is not the principle of our law. Church-rate, therefore, stands in opposition to the principle of our law in analogous instances; for although the parishioners have the benefit of entering the church, the incumbent has the pecuniary benefit, for he has the freehold. As a freeholder, if there were no custom, the rector or vicar would be responsible for the repairs of the church. Church-rate, therefore, depending upon custom, must be strictly confined to its limits. Ther is the custom absolute or particular? If absolute, the parishioners would be bound to repair the church in all cases without exception; but the custom is a particular one, to ease a particular individual of a particular burthen. In the present case, the freehold is in the trustees; the *onus* of making out an exception is, therefore, on the other side. Prior to the division of parishes, other parties were respons-

le for the repairs of the church besides the rector or vicar ; after that, a custom came in to relieve him. So long as the revenues remained in the hands of the bishop, he was bound to repair, and when the custom came in for parishioners to repair, it was in aid of the rector or vicar, and not of any other person. Here, by the local Act, the freehold is taken from the rector and vested in trustees, and the responsibility will go with the freehold, and the trustees are bound to provide funds for the purposes of the Act, and the repairs ought to form an item in a general rate throughout the ancient parish.

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DR. LUSHINGTON.—Assuming the facts stated in the Libel to be true, the rate is a legal rate, and the defendant is bound to pay it ; but this Allegation purports, in substance, to controvert some of the most material facts stated in the Libel : I say, “ in substance,” because it does not in form, and I am of opinion that the questions of law might have been more conveniently raised by pleading the facts in a different shape. The Allegation also purports, besides contradicting the Libel, to plead matters which, it has been contended, would amount to a bar, even if the facts pleaded in the Libel were true. This plea, therefore, is two-fold,—a part denying the averments in the Libel to be true ; in part avoiding them if true. I must assume the facts in this Allegation, for the purpose of considering its admissibility, and then of determining whether, if they be proved as laid, there would be a good defence to the suit.

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JUDGMENT.

The first objection is, that, by virtue of the local Act, 10 Geo. 3, c. 71, the rate ought to have been made by the trustees, and laid over the whole of the ancient parish, and not on a particular part. It is necessary here to look at the facts, and to consider the law, first, as it stood prior to 1790, the date of the local Act. Prior to 1790, Hackney formed one parish, in which stood the ancient parish church. The parishioners of the whole parish were bound to repair that church ; that is, the body of it ; and this obligation was imposed, not by ecclesiastical law, but by custom,—by the common law of England, recognized by various statutes. It is not the ecclesiastical law which im-

First objection.

The law prior to local Act.

Parishioners bound to repair by common law.

- Nov. 29. poses such burthens ; for, by the ancient ecclesiastical law, it was to be defrayed out of the ecclesiastical profits and emoluments. Neither could the ecclesiastical law have produced any such effect, because, unless recognized by the common law, or enacted by statute, it was and is wholly inoperative in this country. This obligation to repair is recognized by all the common law authorities,—by Lord Coke, and, indeed, before his time, in the Reports ; but by Lord Coke and by all authorities who followed him, down to and including Lord Chief Justice Tindal, and the judges of the Court of Exchequer Chamber, in their judgment in *Vale v. Burder*. The obligation is further recognized by various statutes, from the time of Edward I. down to the present day. In the statute *Circumspecte Agatis*,* it is recognized that parties may be proceeded against in the Spiritual Court for leaving the church-yard unenclosed, or the church uncovered, or not conveniently decked. Again, the ancient statute of Edward I.,† which is the law of the land, *Ne Rector prosternat arbores in Cemiterio*, says that the rector is at liberty, if he think fit, to cut down trees in the church-yard, for the repair, not of the chancel of the church, but the body of the church, of his charity, to relieve the parishioners. Again, it is recognized in all the Acts of Parliament in modern times touching the collection of rates. I speak of the legal obligation to repair, not of the mode of assessing the inhabitants. But the common law obligation may be limited by Act of Parliament, and the first question is, what is the effect of the local Act.
- Effect of local Act. In the first place, the title of the Act, and the effect of the 19th sect., prove that the new church was, to all intents and purposes, to be substituted for the old, as a parish church, and being the parish church, it stood in the same legal position, as to repairs and other matters, as the ancient parish church, save so far as any alteration might have been effected by the local Act. The title of the Act is “An Act for taking down the church and tower belonging to

* 13 Edw. I. st. 4.

† 35 Edw. I. st. 2.

‡ “ Si navis Ecclesie indiguerit similiter refectione, et rectora per chiarum indigentium eis caritative de arboribus ipsis duxerint largientur.”

the parish of St. John, at Hackney, in the county of Middlesex, and for building another church and tower for the use of the said parish, and for making an additional cemetery or church-yard ;” and the 19th section enacts that the new church, church-yard, and cemetery, when completely finished and consecrated, shall thenceforth for ever be called and known by the name of the parish church and church-yard of Saint John, Hackney, and be used for all the purposes for which the ancient parish church was used. There cannot, therefore, be any doubt that the new church was simply substituted for the old, and save where altered by the local Act, it stood in the same legal position. Now it has not been contended that there is any express enactment in this Statute by which the rates for repairing the church were to be made by the trustees. After a careful examination, I do not find that “repairs” are mentioned in the Statute. There is, therefore, no alteration (directly at least) of the common law, and any such alteration, if made, must be by necessary implication from other parts of the Statute. The point, then, is this :—Does it follow, as a plain inference from any other part of the Statute, that any alteration of the common law obligation has taken place? So far as I understand the argument, the conclusion, that such an alteration has been effected, is to be drawn from the 21st section, which vests the new church in the trustees during the continuance of the rates to be levied by virtue of the Act.

Now, I observe in passing, that what the particular reason was, why this church should be vested in the trustees during a continuance of the rates, and afterwards in the vicar and the churchwardens of the parish, does not very clearly appear. The rates imposed by the Act for defraying the expenses of building the church are essentially different from ordinary church-rates, in very many particulars. The tenor of the Act itself, the mode of assessment, the manner in which the rates are to be paid, the persons who are to raise them, their application, and so forth, are totally different from the ordinary mode in which church-rates are levied and paid. I do not perceive on what sound principle of law or

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New church substituted for old.

Not enacted that rates for repair to be made by trustees.

Must be by necessary implication.

Reason of vesting church in trustees not apparent.

Nov. 29. reason it can be contended that the mere vesting the church in the trustees, for a certain time, can alter the common law, as to the burthen cast on a parish, or the mode of rating whereby moneys are to be raised for defraying the expense of ordinary repairs. Why should the trustees have this burthen cast upon them, any more than the incumbent before the passing of the Act, or after the rates were paid, and the church vested in him and the churchwardens? The burthen of the repair was neither on the incumbent of the ancient original parish church, nor is the burthen of the repair, or the making of rates, cast on the incumbent after the church incomes vested in the incumbent and churchwardens by the Act. There was much argument, and a great deal of learning brought to satisfy the Court as to what had taken place in former days; but I have great difficulty in applying that learning to the present case. I do not think that this burthen can be imposed on the trustees, for any of the reasons before stated. It cannot be imposed on account of any profits, benefits, or emoluments; those profits, benefits, and emoluments were in the incumbent before, and yet he was not liable; and, moreover, there were none such vested in the trustees at the present day. If I understand the argument correctly, it is this: that the custom of the parish, of repairing the nave of the church, existed only in relief of the incumbent, and not in former times in relief of the church funds, unless they were not appropriated wholly to the incumbent, but paid according to the ancient division. This appears to me to be rather a fit subject for antiquarian research than for legal investigation; for, even if the fact be true, that it was the custom of the parish to repair only when the repairs would otherwise have fallen solely on the incumbent, who received the whole emoluments, for his relief, it would not follow in the slightest degree from these premises, that the mere vesting of the freehold in the trustees, with none of the profits, would render them liable, and exonerate the parish, or give them authority to make a rate for such purpose. I think it unnecessary to follow this point further; it does not come within the principle which was attempted to be applied to

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No alteration
of common law.

Argument as
to ancient
church-rate.

it, the well-known principle, *cessante ratione, cessat lex*: the reason for the custom has not ceased, and, therefore, the custom must remain. No authority has been cited to prove, what would have been in the first instance indispensable, *viz.* that the sole reason of the custom, I mean the ordinary Common Law custom, of the parishioners' repairing the church, was in relief of the incumbent.

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So far, then, as I have hitherto examined the statute of 30 Geo. 3, there is no ground, especially on account of a freehold being vested in the trustees, for holding that the ordinary liability would be taken away, either by express enactment, or necessary implication. There are, however, some other parts of the Act, which I think it my duty to notice.

The 23rd section enacts that, whereas the churchwardens § 23. of the parish have received certain accustomed dues and duties at funerals or interments of the dead, for the use of the ground and tolling a funeral bell, the same dues shall be demanded, taken, and received in the new church and church-yard, and "when received, shall be applied by the churchwardens in aid of the church-rate of the said parish." Now, what rate is meant by these words, "church-rate?" Is it the trustees' rate, or that which is generally understood in the ordinary acceptance to be a church-rate?—a church-rate made in the ordinary form by the churchwardens and the parishioners? In order to sift this question, I must refer to the subsequent sections of the Act. The 24th section § 24. directs that pews or seats may be let to schools, and that the rents arising therefrom shall, during the continuance of the rate to be raised by this Act, be paid to the treasurer of the trustees, and applied to the uses, intents, and purposes of this Act; and, at and from the cessation of the rate, shall be paid to the churchwardens of the parish, and be applied in aid of the church-rate of the said parish. So that, as relates to these funds, the application is twofold; first, during the continuance of the rate, to the trustees for the purposes of the Act, and afterwards to the churchwardens in relief of the church-rate. By the 27th section, it is directed that § 27. certain burial-fees, other and different from those before-

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Result.

mentioned, shall be applied in the same manner as in the 24th section; that is, during the continuance of the rate, to the trustees, and afterwards in aid of the church-rate of the parish. Now, on a careful consideration of these three sections, I think the statute makes an obvious distinction as to the three different species of emolument of which I have spoken. It gives the first, *viz.* the dues and duties payable at the old church, instantly to the church-rate—not to the trustees first, during the continuance of the rate, but instantly to the church-rate. It gives the other two remaining sources of income, *viz.* the pew-rents and certain burials, to the trustees in the first instance, and at the expiration of their trust to the church-rate. Now what can be more evident than this; that the statute clearly contemplates the existence of two contemporary rates? If there were not to be two contemporary rates, what was to be done with the dues and duties payable at the old church, and then collected at the new church during the continuance of the trustees' rates? They could not be applied to the trustees for the Act says, they shall go to the church-rate, and not to the trustees. It is a necessary inference, that the Act contemplated two rates. I am now speaking of the words of the Act; what the intent of the Legislature was, I must collect from those words and nothing else. And if this be so it repels all inference whatever, that common church-rates in the common and ordinary shape, were to cease at any period.

Difficulty in
 respect to §29.

Now I should not act candidly if I did not say that there is still some difficulty left in this Act; for it is true, notwithstanding the sections I have read, that, at the commencement of the 29th section, words are used which apparently contemplate the application of the dues and duties payable at the old church to the purposes of the statute, or the purposes for which the trustees' rate was to be applied. It is a very hard task to give any thing like a satisfactory explanation, or a uniform interpretation, of local Acts like this. The words are these; "that as the aforesaid dues and duties payable to the churchwardens of the said parish," not trustees, "may be insufficient for the purposes of the Act, the

trustees shall have power to make a rate." Now, how this is reconcileable with the preceding sections, I confess I am at a loss to conceive. But I have no doubt about the effect. I have no doubt that a mere statement of an Act of Parliament, as a mere inducement for directing new fees to be levied, can by no possibility overrule the clear terms of the three preceding sections.

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I am of opinion, therefore, that this statute has not repealed the ordinary church-rate, during the existence of the trustees' rate, and that, therefore, the objection that the trustees ought to have made the rate for repairs, and for the expenses ordinarily attending divine service, falls to the ground.

First objection fails.

The next objection is, that the rate made by the churchwardens ought to have extended over the whole parish, from the period when the new church was first erected, *viz.* from 1790. to 1824. No doubt, such was the law. But in virtue of the Church Building Acts, 58 and 59 Geo. 3, the original parish of Hackney was divided into three separate parishes; and, if there be any alteration of the limits over which the church-rate extended, it must be in virtue of the provisions of these Acts. I have already said, that it is no easy matter to discover the true meaning of the local Act, and to reconcile the discrepancies which there appear; but that local Act is light itself, compared with the obscurity of the Church Building Statutes. To them, however, I must now apply myself.

Second objection.

Depends on the Church Building Acts.

Their obscurity.

At the period of making the rate in dispute, Dr. Watson, who had been the incumbent for many years, was dead; consequently, without adverting to any previous resignation at that time, the division into distinct parishes had completely taken effect. Now, the 16th section of the first 45 Geo. 3. Church Building Act, 45 Geo. 3, after empowering the ecclesiastical commissioners and the Crown to divide a parish into two or more distinct and separate parishes, for all ecclesiastical purposes whatever, provides that no such division shall completely take effect until after the death, resignation, or avoidance, of the existing incumbent of the parish to be divided. It will soon appear that this distinction

Nov. 29. *Varty v. Nunn.* is a very important one. The question, therefore, is, does the Act provide that the church-rate for such distinct parish (here are three distinct parishes) shall be levied on the divided parish only, or does it not? If it does not, the old common law remains unaltered, which throws the burden upon the whole parish.

§ 16. The 16th section declares that the parish may be divided into two or more distinct parishes for all ecclesiastical purposes whatever; and by these words a necessary implication is raised, that the old common law was altered, and the rate was confined to the curtailed parish. Certainly it is not inconvenient that so important a matter, affecting the interests of so many persons in this extensive parish, and in other extensive parishes, throughout this country, should be altered without any express enactment whatever. But so it is, and I must now see whether the true meaning of this section is helped out by any subsequent enactments, viz. the 31st section of the 58 Geo. 3, the 70th and 71st sections of the Act, and the 20th section of 8 Geo. 4.

58 Geo. 3, § 31. The 31st sect. of 58 Geo. 3 is as follows: "That no division of any parish or extra-parochial place, whether it be divided into separate parishes with the consent of the patron and bishop of the diocese, or into district parishes, nor any thing in this Act contained in relation thereto, shall affect, or in any manner be construed to affect, any parish or extra-parochial place so divided, or the persons residing therein, or in any other respect than in this Act particularly provided, or in any manner to apply to any poor or other parochial rates which may be raised in the parish or extra-parochial place so divided, or in any such separated parish or district parish, or to the maintenance or relief of poor persons, or to any title or claim to such relief, or to any powers relating to any such rates, or holding vestries, or appointment or powers of parish officers, or any such relief or claim thereto, or to any Act or Acts of Parliament, or law, or custom relating thereto; save and except as to church-rates, in so far as the same are regulated by the provisions of this Act; but the original parish shall, to all such purposes, remain and continue in law a parish to all intents, as if no such division

hereof into separate parishes or distinct parishes had been made."

Nóv. 29.

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Now, would anybody have believed, *a priori*, that with such an enactment as this, so strong, so conclusive, so comprehensive in its terms, with a clear exception as to church-rates, so far as they are regulated by that Act, there is not to be found, in any of these Acts, any distinct provision for the raising of the rates where a parish is divided into three distinct parishes, different from the ancient form? There is not one direct enactment, where parishes are divided into distinct parishes, that the ordinary church-rate shall be levied in each distinct parish, and not in one, and to solve the question, whether such was the intention of the Legislature, or whether such effect has been wrought through the medium of other enactments, is the task imposed upon the Court; a question which never yet has been solved, but which, I know, has raised considerable difficulty in the minds of others, as well as myself.

No distinct provision in Acts for raising of church-rates, where a parish is divided into three distinct parishes.

The 70th section enacts, "that the repairs of all such district," not distinct, "churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches by parishes; and every such district shall be deemed in law a separate and distinct parish for that purpose; and the repairs of all chapels not made district churches shall be made by the parish in or for which the chapels shall be built."

Now here is a plain and intelligible enactment as to the mode and extent of the rate for district churches; but not a word as to distinct and separate parishes.

The 71st section provides "that every district shall remain nevertheless subject for twenty years, to be accounted from the day upon which the district church or chapel shall be consecrated, to the repairs of the original parish church, and be deemed part of the original parish for all purposes of such repairs, and the making and levying of rates for that purpose; and from and after the expiration of such twenty years, the parish church shall be repaired by the district of the parish left as belonging to it after the other divisions of

§ 70.

§ 71.

Nov. 29. districts are made ; and each district shall for ever then
 after make, raise, levy, collect, and apply separate and distinct rates for repairs of the church, or churches, or chapel of the district, as if a separate parish."

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I do not allude particularly to the 20th section of the Geo. 4, because, though it was intended to clear up the embarrassment which had arisen on the subject of repairs, it does no such thing ; it leaves the case just where it found it as relates to this subject.

Difficulties.

Looking, then, at all these enactments, I confess I feel very great difficulty and embarrassment. Had the case stood upon the 16th section alone, the path would have been more easy, because that section declares, that, where the division is into separate and distinct parishes, it shall be for ecclesiastical purposes. But the 31st section has created great obscurity ; referring, as it does, not simply to the poor-rate, but to all parochial rates, and enacting that they shall remain unaltered save as to church-rates, as provided for by the Act. I am compelled to say, that the 70th and 71st sections rather assume it to have been enacted that separate and distinct parishes shall each bear their own rate, than enact that they shall actually do so.

Rule of construction.

I now come to consider what I shall do in this difficult position of the case, and whether the rules of construction laid down by the highest Courts of Westminster Hall, will enable me, amidst all this difficulty, to come to any thing like a safe and sound conclusion. I nothing doubt the intention of the Legislature ; but I hesitate greatly as to whether they have expressed that intention. Nothing is more common, in an Act of Parliament, than to find that the Legislature *quod voluit, non dixit* ; that the intention may be collected, though the expression has been omitted. My opinion is, notwithstanding what I have already said from the time when the division became complete, under the 16th section, the rates must be made for each separate and distinct division. My reason is this: the rule of construction laid down by the highest Courts is, that if you are in doubt and difficulty as to the true meaning of an Act of Parliament, you must adopt that construction which will not lead

a palpable absurdity. Now, what would be the consequence if I were to come to a different conclusion? The consequence would be a palpable absurdity; that a district parish would be exempt from the repairs of the mother-church at the end of twenty years; but if a parish be divided into three separate and distinct parishes, the two separated parishes must maintain the mother-church to all eternity; which is an absurdity.

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That I may not be thought to avoid any of the difficulties with which I admit the case to be beset, this is the principal ground of my coming to my conclusion, and the words which I use as working out that conclusion are those used in the 70th and 71st sections, which say that a district shall be deemed, in law, a separate and distinct parish for that purpose; assuming, therefore, that wherever there was a separate and distinct parish, the rates were co-extensive with that separate and distinct parish, and no further. It will be observed, that I have all along relied upon the fact of the division being complete; because, had there been no resignation, and no death of the incumbent, notwithstanding they were divided into three separate and distinct parishes, under the proviso at the end of the 16th section, the rate must have been over the whole parish.

Having thus declared my opinion, that the rate ought not to be made by the trustees, and that it ought not to extend over the whole original parish, the question which immediately follows is, as to whether the churchwardens were duly appointed, and are the proper persons to sue for church-rates. It is perfectly true that several of the articles in this Allegation go to shew that the churchwardens, elected by the inhabitants of one division of this parish, cannot act as trustees, or discharge divers duties, under the local Act. This may or may not be the case, and on such a question I give no opinion, for it does not belong to me to decide it. The sole question for me to determine is, whether they are legal churchwardens of the division of St. John, and entitled to sue for church-rates in this case. Here again, on a question so important as this, as to who are to be the legal churchwardens where one parish is divided into three

Third objection.

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separate and distinct parishes, I think I have a right to say, there ought to be an express legislative declaration. But so far as I have been able to refer to these Acts, I fear there is none; and here again, the intention of the Legislature is to be painfully collected by inference only from other enactments. The 73rd section of the 58 Geo. 3, directs "that two fit and proper persons shall be appointed to act as churchwardens for every church or chapel built or appropriated under the provisions of this Act," and that they shall do every thing right and fitting as to repairs and so forth; but not one word is said as to what is to become of the ancient churchwardens, the ancient officers of the parish. All that it enacts is, that the new churchwardens for a district parish, or distinct church, may do certain acts; but as to how the old churchwardens are to be elected, all is left in the dark. As I said, the 78rd section provides for the appointment of churchwardens in the new church, and the 71st directs that every district shall remain liable for repairs of the parish church for twenty years, "and be deemed part of the original parish for all purposes of such repairs, and the making and levying of rates for that purpose; and from and after the expiration of such twenty years, the parish church shall be repaired by the district of the parish left as belonging to it after the other divisions of the districts are made," and that each district shall ever after make and apply distinct rates for the repairs of the church, as if a separate parish.

I have proceeded in my painful inquiry through these Acts, to see whether I could gain fresh light from subsequent enactments, and I will refer to those which appear to elucidate the questions to be determined.

1 & 2 W. 4.

In the Act 1 and 2 Will. 4, c. 38, I find two sections, the 23rd and 25th, applicable to the subject. The 23rd enacts that if any person is willing to endow a Chapel of Ease, it may be separated from the parish church, and made a distinct parish. Being so, the Legislature, wisely, prudently, and cautiously, go on to enact what shall be done by churchwardens; for the 25th section directs that two fit and proper persons shall be chosen yearly out of the inhabitants of the

new parish, to act as churchwardens of the said parish, one by the minister and one by the vestry, who "shall do all things pertaining to the office of churchwardens, as to ecclesiastical matters, in the said new parish, in like manner as though the same had been of old time a separate and distinct parish." According to this section, the new churchwardens would be competent to do all "ecclesiastical matters," and nothing else; they would not be churchwardens of the whole parish.

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Now I am sorry to say that, having stated these difficulties, as I am bound to do, in plain, clear, and explicit terms, have no other choice than to revert to the same principle of construction which I mentioned before, namely, that which avoids absurd consequences; though I fear, in resorting to that principle on this occasion, I shall leave many matters in a state of great difficulty and embarrassment in other respects.

If Parliament had intended that the churchwardens of the ancient parish of St. John Hackney should be chosen by the whole inhabitants, *qua* churchwardens, and not by the inhabitants of the curtailed parish, the consequence would be this: the churchwardens would be chosen by the inhabitants of every district under the 78rd section, and by the inhabitants of every distinct parish under the provisions of the 1 and 2 Will. 4; and yet, though in the two minor cases the churchwardens would be elected by the inhabitants of a district or distinct parish, yet in a divided parish, under the Church Building Acts, the inhabitants of a distinct or curtailed parish would not be electors. Now although I admit, and do not disguise from myself, that if the effect of my judgment is to say that the churchwardens are good in respect to church-rates, it does not get rid of the difficulty, whether they are good churchwardens for other purposes; but I am bound to adopt an interpretation that would avoid gross absurdity; and under the 16th section, which speaks of "ecclesiastical purposes," and under the 78rd section, to hold that these churchwardens are churchwardens of the district parish of St. John's Hackney for the purposes of church-rate, and doing and causing to be done the necessary repairs, so far as relates to the church of St. John's Hackney, and

Result of the
 sections.

Nov. 29. are properly elected by the inhabitants of that curtailed parish. I hold them to be good for the rate for the repairs appertaining to the church only, and I give no opinion as to other purposes. Therefore, I think (though with much doubt and after great consideration) I must hold, according to the rule of construction I have stated, that these churchwardens have been duly elected for the purposes of this suit.

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Churchwardens properly elected by the curtailed parish.

Objection for want of notice, fails.

Now if I am correct, the objection on the score of want of notice under the Vestry Act falls to the ground; for if the election is in the inhabitants of St. John's Hackney only, I have not heard it alleged or argued that a proper notice has not been given.

The class of objections which I have already considered are such as would vitiate the rate; I now proceed to a class of objections of a different character, which would have the same effect as a denial of the facts in the Libel.

Fourth objection.

The first of these objections is, that the churchwardens had, or might have had, funds in their hands applicable to church repairs, and therefore a rate was not necessary, as it is alleged in the Libel. I hold that there is a very wide distinction in law between the actual possession of funds and the power of acquiring them: it is one thing to have money in hand, and another to have the means whereby to get it.

Churchwardens not proved to be in actual possession of funds.

If I had the churchwardens in actual possession of funds clearly applicable to church-rate, and which would render a rate unnecessary, I should be bound to pronounce against the validity of this rate, for it is always essential to the validity of every church-rate that it be necessary. But I do not find it is even so pleaded. The 7th article pleads that the dues and duties have been raised and collected, and that a large amount hath from time to time been realized, "but that the said dues and duties arising from the use of the burial-ground are not applied in aid of the church-rate." This is not an averment that the churchwardens have received the dues—if it had been intended to put the fact in issue, that the churchwardens were in possession of funds,—I should not require the amount to be stated—it should have been distinctly pleaded, and the churchwardens might have been required to answer on oath. But it is not stated that they received one shilling. I dismiss, therefore, from my mind, all consideration that the

churchwardens, at the time of the rate, were in actual possession of the funds referred to. Although the question I am about to discuss is hardly raised by the facts stated in the Allegation, still, as the objection has been much pressed in the argument, I will consider what is the law where it is pleaded that the churchwardens ought, if they had done their duty, to have had funds in their hands, though they had them not actually in their possession.

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What is the law, where churchwardens might have had funds.

I am of opinion that the course to be pursued by the Court would depend upon the particular circumstances of each individual case, and that no general rule can be laid down to govern all cases. If the churchwardens had a rate uncollected, such a rate as would be sufficient for all the necessary expenses of church repairs, I should refuse to recognize the validity of a new rate, for they would have nothing to do but to collect the old rate, and by obtaining a new rate they would be in no better situation than before. But if it be said that there is a certain amount of money due belonging to estates given for the benefit of the church, or of the church-rates, I have no right to deal with the churchwardens in their character of trustees, and enter into questions which are for the cognizance of other tribunals. In the mean time, the church must not fall down till these difficult questions of law are decided.

Depends upon circumstances of case.

If a rate uncollected,

A new rate unnecessary.

Court cannot deal with churchwardens in their capacity of trustees.

I do not think that I am bound to give any decided opinion as to the effect of the local Act with relation to the application of the dues and demands payable at the old church or at the new; but I think it sufficient to express my opinion, that if there were any usual and accustomed dues, as stated in the local Act, such dues are by the 23rd sect. of that Act to be applied in aid of the church-rate. But I must observe, that my jurisdiction as to such dues and demands is very limited indeed; for I have no authority to decide whether there are any dues at all, and I never could enforce their payment: all this is for Courts of Common Law to determine. Tables of fees settled by the Ordinary never can be legal fees; they may be fees which the Ordinary may think fit and proper to be received; but legal fees can only be by immemorial usage, or created by Act of

Application of dues under local Act.

Court has no authority to decide on such dues.

Fees not legal fees.

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Parliament. The two tables of fees before me can be for no other purpose than to intimate, on the part of the very learned persons who have signed them, what in their opinion was fit and proper to be done. Amongst other things, I find in one of these tables* the following: "For every corpse removed out of the parish shall be paid the whole duties to the minister, churchwardens, clerk, and sexton, as if all in the church," which is absolutely illegal from the beginning to the end.

Under these circumstances, how can I hold that the bare possibility of the churchwardens receiving some fees prevented the necessity of a church-rate? I have not jurisdiction to compel the churchwardens to act. How can I compel them to do that which falls within the jurisdiction of other Courts? It is pleaded that the rate is excessive, because it was not wanted, as they had other funds. I cannot pronounce the rate excessive on any such ground, and no particular objection has been made to any of the items in the Allegation, or by the Counsel at bar.

Rate not invalid on ground that churchwardens had other funds.

Fifth objection.

Rate must be made on occupier, but immaterial who pays it.

It has been urged by the Queen's Advocate, that the rate is illegal because, although the occupiers are assessed, the landlords of a large class have been called upon to pay the rate, and this is compared to a church-rate apparently prospective, but in reality retrospective. The cases, however, are wholly different. The rate ought to be made on the occupier and he is liable to pay it; but it is not of any importance who pays it: the legal responsibility is upon the occupier only; but if there is any arrangement made by which the landlord pays, that furnishes not the slightest objection to the rate. In the case of *Thompson and Sandford v. Cooper*,† Sir William Wynne held that landlords may be rated instead of occupiers. I mention this, because, until that decision is reversed, being a decision of the Court of Arches, it would be binding upon me whether I assented to the doctrine or not. I am, however, of opinion that, if all persons liable to assessment be duly rated, it is not of the slightest importance to whom application is made for payment of the rate.

* Table of Fees for the Parish of St. John's Hackney, 9th April, 1838.
† 3 Phill. 640.

I have now arrived at the last topic, and the question is, Does the Allegation state sufficient facts to shew that the rate has been unequally assessed? If the rate be clearly unequal, it will be invalid; but a slight inequality will not vitiate the rate, for it is impossible to rate all property with perfect precision, and there would be differences of opinion as to the value of different properties. An Allegation, that professes to aver that a rate is unequal, should state the various properties and specify cases in which property was not rated according to the true principle of valuation. But this Allegation does not state any such thing. There is an averment that houses are rated in the Church-rate Book, and the persons are called upon to pay according to the principle of the poor-rate; but the rate would not be invalid on that account. There is, indeed, an averment as to some of the houses, that some are rated according to one rate and some on another. But the poor-rate is taken on a gross estimate, not on a different principle. In one article, the gross estimated rate for the poor is said not to be the true principle, yet I am called upon to say that the gross estimate for the poor-rate is the true criterion. Suppose all the facts in this part of the Allegation be substantially established, it would decide nothing as to the validity of the rate.

I have endeavoured (no easy task) to compare the church-rate with the poor-rate. I presume from the heading of the Poor-rate Book, that the poor-rate was made in pursuance of the 6 and 7 Will. 4, c. 96, and the local Act. The Act of Will. 4 requires that the value shall be the actual, not the estimated value. The estimated value of the poor-rate is said to be no criterion, and it is pleaded that the estimated value is below the actual value. I will grant it is so; but unless the parishioners are assessed too high, the rate would not be invalid; there is nothing to shew that it would be unequal. I do not deny that it may be so; but my judgment must be confined to what is stated in this very Allegation; I should betray my duty if I stirred one inch out of the facts stated in the Allegation. I am not to presume any thing, and if there has been erroneous or defective pleading, the party must take the consequence of it.

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Last objection.

A slight inequality will not vitiate the rate.

Question limited to facts in plea.

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Case of *Chester-
 terton v. Farlar.*

In the course of the argument, the case of *Chester-
 terton v. Farlar** was cited. I have considerable difficulty in under-
 standing how that case has any bearing whatever upon the
 present. To prevent any misunderstanding, I will explain
 how that case stood. The churchwardens of Kensington
 had sued for a church-rate, in the ordinary form; the de-
 fence was this: that the rate was retrospective. In reply,
 the churchwardens themselves pleaded that, although the
 rate was retrospective, yet that the retrospectiveness was
 justified by the facts: it had been also alleged, by way of
 defence to the suit, that persons had been omitted who
 ought to have been assessed, and the churchwardens stated
 in their responsive Allegation the reasons why they were
 omitted. I rejected this part of the Allegation. Why?
 Because the churchwardens, in admitting the rate to be re-
 trospective, admitted themselves out of Court, and the re-
 son why the names were omitted would not avail when they
 had admitted themselves out of Court. I did not give any
 opinion whether the article as to the omission of names
 would have been a valid defence or not. I did say, in that
 case, that the law required that all property should be rated;
 and I am of that opinion still, though I do not consider that
 it would vitiate the rate if one or two were omitted. But I
 say that all ought to be rated, for if all were not rated, you
 might have a rich man inhabiting a cottage, and not paying
 a church-rate.

Facts do not
 raise question
 of inequality.

Allegation
 rejected.

I have now, I believe, gone through the whole of the
 objections made to the rate, and with regard to the last, I
 am satisfied that the facts do not raise the question of the
 inequality of the rate. Inequality is a legal defence, but it
 must be put in plea, and in this article it is not so, and
 therefore the article is not admissible. Therefore, having
 considered the questions of law, I have come to the conclu-
 sion that, if the articles were proved, as laid, they would
 not be a legal defence to the suit, and I must, accordingly,
 reject this Allegation.

* 1 Curt. 371.

Prerogative Court of Canterbury.

DECEMBER 6.

IN THE GOODS OF GEORGE THOMPSON, DEC.—*Motion.* A will destroyed by mistake.—Probate of a schedule of legacies, as part of the will, refused on the ground that the proof of due execution of the will was insufficient.

—The deceased, an engineer, died 19th August, 1841, leaving a widow and three children, one a minor of thirteen. On the day of his death, search was made for his will by his widow, his two sons, and W. B., who, the deceased had stated, was one of his executors, to ascertain whether he had given any directions for his funeral, and in his writing-desk was found a paper writing, purporting to be a will, dated 2nd July, 1841, in the deceased's handwriting, and signed by him, but unattested, and which W. B. read aloud. At the same time, another paper was observed, also in the hand-writing of the deceased, dated 25th December, 1838, which was attested by three witnesses. Considering the former paper to be the will, W. B. advised that the paper last found should not be read, as it was a "dead letter," and it was torn up and burnt by the parties present, in the belief that it was superseded by the paper of 1841. The will destroyed was only partially read, but in the first sheet certain words were observed to have been struck through. In both papers, E. C. R. and W. B. were named executors, and on the facts being known to the former, he said, they had destroyed the valid will. No draft of this will had been found, but the widow and two sons made oath to the truth of a schedule of the purport of such part of the will of 1838 as was perused by them previous to its destruction. Two of the attesting witnesses to that will had made affidavits as to what took place at the execution. The personal property amounted to £4,800.

Addams, D., moved for probate of the schedule of legacies, containing such part of the will as could be ascertained, to the executor, W. B., limited until a more authentic copy or extract should be brought into the Registry.

SIR H. JENNER.—The paper of July, 1841, is totally inoperative, for it is not attested by witnesses, and, consequently, the paper of 25th December, 1838, was, if duly

DEC. 6. executed, the real will of the deceased. Now some part
Thompson, dec. of this will was read at the time it was found, and a schedule
 is annexed to one of the affidavits of the purport of the part
 which was read. Unfortunately, there is no evidence which
 can enable the Court to say whether this schedule is or is
 not entitled to probate. It is necessary for the Court to be
 Must be proof that the will was validly executed. satisfied not only that this schedule is really a part of the
 will, but that the will itself was validly executed, that is,
 that it was signed by the deceased, or the signature duly
 acknowledged by him, in the presence of two or more wit-
 nesses present at the same time, who attested the execution
 in his presence. Now it appears that two of the witnesses
 have deposed that they were present together, when the will
 was executed, and that they subscribed their names thereto
 in the presence of the testator ; and so far as their evidence
 goes, there is sufficient proof of the existence of the paper.
 Evidence. The third attesting witness, who is a brother of the deceased,
 is deaf and dumb, and he has no recollection of the circum-
 stances ; but there are the affidavits of J. R. and G. B., the
 other subscribing witnesses to the paper. J. R. says that, on
 the 25th December, 1838, he was desired by the deceased to
 come into his counting-house at the factory, Pimlico, where he
 found the deceased at a desk, with a paper writing lying be-
 fore him, and there was also present S. T., the deceased's
 brother ; that the deceased desired the deponent to sign his
 name thereto, and particularly requested him to sign his
 Christened name in full, and not abbreviate it, which he is in
 the habit of doing ; that he thereupon, in the presence of
 the deceased and S. T., signed his name to the paper, when
 the deceased by signs to his brother requested him to sign
 his name, which he did in the presence of the deceased and
 of the deponent ; that he does not recollect whether the de-
 ceased signed his name in the presence of the witnesses or
 not, nor does he recollect whether or not the signature of
 the deceased was to the paper, and he cannot set forth the
 purport or contents of the paper, which was a sheet, and
 appeared to be written on the first and about half the second
 side ; but he did not see the writing on the first side, and he be-
 lieves the whole contents were in the deceased's hand-writing,

with which he is well acquainted, and he conjectured it was his will, or some paper of importance, but does not recollect that the deceased said what it was; and on further consideration, to the best of his recollection, he believes, there was one other of the deceased's workmen, G. B., also present, who also signed his name thereto. So that, unfortunately, this witness does not recollect whether the deceased signed the paper in their presence or not, or acknowledged that it was his will, or whether it was signed at the time or not. The other witness speaks almost to the same effect. He does not recollect seeing the deceased at such time with a pen in his hand, or that he signed the paper in their presence, nor did he observe his signature thereto, nor read any part of the writing, which he thought had reference to an apprentice of the deceased: so that both the witnesses were ignorant that it was a will of the deceased they were attesting, J. R. thinking it a will, or some paper of importance.

Dec. 6.

Thompson, dec.

Deficient.

I am afraid that, under the circumstances, the Court not having the will before it, and the witnesses not being able to recollect whether it was executed by the deceased in their presence or not, I cannot on such evidence pronounce that the will was executed in conformity with the statute. If the witnesses are not able to recollect the facts, how is the Court, in such a case, to know that the provisions of the statute have been complied with? Under the circumstances, I am of opinion that I must reject the motion.

Motion re-
jected.

IN THE GOODS OF HANNAH DRURY, SPINSTER, DEC.—*Motion.*—The deceased died 9th October, 1841, having executed (by a mark) a will on the preceding day, appointing T. B. E. and S. C. "sole executors." There was no formal attestation-clause; instead, there appeared, "Witness, S. C., J. B." Upon inquiry by the proctor, for the purpose of preparing an affidavit to supply the deficiency of the clause of attestation, it was discovered that the paper had been executed in the presence of the two witnesses, but one of them had not subscribed it until after the death of the deceased. In their affidavit, J. B. deposed

A paper executed in the presence of two witnesses, one of whom did not subscribe till next day, after the deceased's death, —probate refused.

DEC. 6. that he prepared the will at the request of the deceased, who was ill in bed, and who affixed her mark thereto, in his presence and that of his fellow-witness; that the deponent then subscribed his name to the paper in the presence of the deceased and S. C., who, being ignorant of the necessary forms, did not sign her name thereto till next day, after the deceased's death, when the deponent, "thinking it more advisable that the name of S. C. should appear on the will, she having been present at the execution thereof, requested her to sign the same; but there not being room underneath his signature, she signed her name above it." S. C. deposed that she was present, and saw the deceased place her mark to the will in the presence of her fellow-deponent, who then signed his name thereto; but the deponent did not sign hers till next day, shortly after the death of the deceased, when she did so by desire of J. B. The appointment of executors was made after the first execution, and the paper was re-executed in the same manner, except that the order of the witnesses' names was reversed. The deceased left two brothers and two sisters, her only next of kin, who were named residuary legatees in the will. The property amounted to £420 stock.

MOTION. *Bayford, D.*, moved for probate of the paper.

JUDGMENT. *SIR H. JENNER.*—The paper purports on the face of it to have been regularly executed, and attested by two witnesses; but upon the proctor (very properly) inquiring as to the manner in which the will was executed, it turned out (and this shews the propriety of the rule which the Court has laid down, that, where there is no formal attestation-clause, there shall be an affidavit as to the facts of the execution) that only one witness attested the paper in the presence of the deceased. I must reject the motion.

Propriety of the rule of Court.

Only one witness attested in deceased's presence.

Motion rejected.

Alteration in a will, without evidence as to whether made at or after execution.

IN THE GOODS OF ANNE HOLLOWAY, SPINSTER, DEC.—
Motion.—The testatrix died 22nd May, 1841, having duly executed her will, with a codicil, appointing her brother, J. P. H., and sister, S. H., executors. J. P. H., shortly after her death, found the papers, in their present plight, in a

drawer in the testatrix's bed-room, where she had stated to him that, in the event of her death, they would be found. The will is dated 7th September, 1839, and the codicil (which is written on the back of the last sheet of the will) 18th May, 1841. Various unattested alterations appeared in the will, none of which were material, except one in the residuary clause. In the will, as it originally stood, the residue was given to S. H., the sister, "for her life [*sic*] and benefit," which words were struck through, and the words, "entirely at her own disposal," interlined. The whole of the will and interlineations therein, as well as the codicil, were in the hand-writing of the testatrix's sister, S. H., who survived her, but died 23rd May, 1841, the day after the testatrix. No evidence could be obtained as to when the alterations were made, which were not brought to the notice of the witnesses, who merely attested the execution. J. P. H., the brother, and S. H., the sister, of the testatrix, were at her death her only next of kin. S. H., the sister, in her will, named the testatrix and her other sister, M. H., executrices and universal legatees; and both dying in her life-time, J. P. H., the brother, became her legal personal representative, and in July, 1841, letters of administration, with will annexed, of the goods of S. H., were granted to him as the only next of kin. The will disposed of real as well as personal property; the latter was under £100. The codicil related to real property only.

Dxc. 6.
Holloway, dec.

Alteration.

No evidence
as to date.

Sir J. Dodson, Q. A., moved for probate of the will as it originally stood. Whether the residuary clause were as the will originally stood, or as it now stands, the property would become that of J. P. H., the brother.

SIR H. JENNER.—Although it is unimportant to the party in this case which way the question is decided, it is of importance, in respect to principle, that the Court should endeavour to ascertain at what time it is probable the alteration was made. The freehold property is devised to the deceased's sister, S. H., for life, then to her brother, J. P. H., for life, then to her niece, E. S. Y., for life, then to the issue of her niece, and if she leave no issue, then to her cousin, Lord Denman. The codicil is to this effect: "It is my

MOTION.

JUDGMENT.

DEC. 6. wish, since writing my will, that my sister, S. H., if she
Holloway, dec. thinks it necessary to sell the house after my decease, she
 has my full consent so to do, and likewise to leave it to
 whom she pleases after her death—my dear sister Sarah,
 knowing my wishes on the subject, will, I am sure, do what
 is right." I cannot but think it probable,—the Court has
 no means of knowing whether it is so or not,—that the
 alteration as to the residue was made at the time the codicil
 was written. It is impossible to say more, as there are no
 circumstances from which the Court can collect the time
 when the alteration was made, the sister, who made it, hav-
 ing survived the testatrix only a single day. Probate of the
 will must, therefore, pass as it originally stood. Possibly
 the Court may be entirely wrong; but it has endeavoured
 to ascertain, as far as it can, the real fact. If the alteration
 had made any difference to parties, the will must have been
 propounded.

A codicil destroyed by the executor and legatee, through mistake or inadvertence. — An unexecuted copy admitted to probate.

IN THE GOODS OF LIEUT.-GENERAL WILLIAM THORNTON, DEC.—*Motion*.—The deceased died 18th November 1841, leaving a will dated 28th October, 1831, and a codicil thereto, dated 13th October, 1838. On the 25th October 1841, he executed a further codicil, under the following circumstances. The testator by his will had bequeathed to his cousin and heir-at-law, Thomas Reeve Thornton, Esq (at whose seat he had resided for the year preceding his death), who was his executor and residuary legatee, all his paintings in his house at Grosvenor Gate, with a direction that they should be kept as heir-looms at the family seat at T. R. T., at Brockhall, Northampton. A day or two previous to the date of this codicil, the testator had put into the hands of T. R. T. a paper sealed up, bearing the following superscription: "Thomas Reeve Thornton, Esq., Brockhall, Weedon; to be delivered on my decease: Wm. Thornton:" desiring T. R. T. to open and read it. This gentleman seeing by the direction that the paper had been intended by the testator to be delivered after his death, hesitated, from motives of delicacy, and delayed doing so till he could con-

fer with his son, E. T., a barrister. On the 25th October, T. R. T., with the concurrence of his son, opened the paper, and found enclosed therein a paper in the testator's handwriting, addressed to T. R. T. in form of a letter, in which the testator, referring to the direction in his will that his paintings should be kept as heir-looms, stated that he considered the request unreasonable, and desired that T. R. T. would consider himself at liberty to dispose of them as he saw fit. E. T., on perusing the letter, with his father, observed that it would have no effect to invalidate the direction in the will, as to the paintings, and stated that the testator's intention could only be carried into effect by a formally-executed instrument, and he accordingly wrote out a codicil to the effect of the letter; but upon completing the same, he found that he had not left sufficient space for the signatures of the witnesses and for the testator's seal (which was large), and he therefore made a fresh copy, which, having been submitted to and approved by the testator, was on the same day duly executed by him in the presence of witnesses. The testator and the two witnesses then left the room, and T. R. T., in the presence of his son, enclosed the letter and its envelope, and with them (as he and his son imagined) the codicil just executed, in an envelope, which he sealed up, and the first copy of the codicil being considered of no use, T. R. T. took up a paper, which he and his son supposed to be such copy, and threw it into the fire, and it was destroyed. The envelope containing the enclosed papers remained in the possession of T. R. T. till after the death of the testator, when, upon breaking the seal, he discovered that it contained only the letter and its original envelope, and not the codicil, which he sought for, but could not find. In the course of his search, however, he found the copy of the codicil first made, which he intended to destroy and supposed he had destroyed. T. R. T. and his son concluded that, by mistake, the executed codicil must have been burnt instead of the first copy, which E. T. now deposed to be an exact counterpart of the executed codicil, except the signature, seal, and attestation.

Robinson, D., moved for probate of the will and first codi-

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Thornton, dec.

Codicil.

Fresh copy.

Executed.

Codicil burnt.

MOTION.

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cil, and of the copy of the further codicil, dated 25th October, 1841, limited till the original or a more authentic copy should be brought into the Registry.

JUDGMENT.

SIR H. JENNER.—There is full proof of all the facts, as far as possible, in this case, and it is fortunate that the first copy was preserved, otherwise the Court might have had considerable difficulty. Here there can be no doubt that the codicil, prepared by the executor's son, was duly executed by the testator, and duly attested by two witnesses; and, under the circumstances, the Court decrees probate of the papers in the terms of the motion.

Motion
 granted.

Administra-
 tion-bond al-
 lowed to be put
 in suit against
 sureties of a
 deceased insol-
 vent administra-
 tor, who had
 misapplied the
 assets.

RUDGE, BY HIS ATTORNEY, *v.* PARTRIDGE AND NEWMAN.

—*Motion.*—J. P., the testator, died 23rd September, 1822, having made his will, appointing J. B. sole executor and residuary legatee in trust, and his nephew, T. H., residuary legatee. J. B. renounced probate, and on the 31st October, 1822, administration with will annexed was granted to T. H., the nephew, who possessed himself of the whole effects, having given the usual bond to the amount of £20,000, with two sureties, N. P. and C. N., for the due administration of the effects, which were sworn under £12,000. The testator had bequeathed his personal estate to the before-mentioned J. B. upon trust (amongst other things) to invest £1,000 for the benefit of the three children of H. R., when they should attain the age of 21. H. R. the younger (the eldest of these children) attained his majority 22nd April, 1840, and being resident at Rio de Janeiro, gave a power of attorney to W. T. P. to receive his third part or share of the £1,000. T. H., on being applied to by W. T. P., declined to pay the legacy; in order to ascertain the existence of assets, a citation was extracted against him, to exhibit an inventory and account, which were brought in by T. H., whence it appeared that the assets were more than sufficient to pay the debts and legacies. A suit was thereupon instituted in the Arches Court for the recovery of the legacy; a citation issued against T. H., who gave an appearance; but the proceedings determined, before a decree had been obtained for

1841.
 19th May.
 29th Aug.

the payment of the legacy, by the death of T. H., who died intestate and insolvent, and no party was willing to apply for administration of his effects. The estate of J. P., the original testator, had been misapplied by T. H., who had converted the same to his own use.

Dnc. 6.

*Rudge v.
Partridge.*Assets mis-
applied.

Sir John Dodson, Q. A., moved for a decree against the two sureties to shew cause why the bond should not be permitted to be sued upon at common law, and was proceeding to argue that, in the case of a legacy, it was not necessary that this motion should be preceded by a decree against the principal; that the administration-bond stipulated that the administrator shall pay "debts and legacies," and non-payment was a breach of the bond; when he was stopped by the Court.

ARGUMENT.

SIR H. JENNER.—This is a clear case. As the legatee only attained his majority in April, 1840, and is resident abroad, there has been no delay on his part. It appears, according to the inventory and account exhibited, that the assets amounted to £10,899, and the debts to £8,277, leaving a balance of £2,622, and therefore there were assets sufficient to pay one-third of £1,000, to which Mr. Henry Rudge the younger is entitled. Mr. Howell, the administrator, has died insolvent, and no person has applied, or is likely to apply, for administration of his estate. There is no difficulty whatever in the case. The breach of the bond is ascertained; the legacy is not paid, and assets are admitted. It may appear that, after so long a time, there is some degree of hardship in proceeding against the sureties; but they ought to have known, at the time they gave the bond, that they would not be discharged till the money was properly disposed of, which could not be done till the children of Mr. and Mrs. Rudge arrived at the age of 21 years, which would be after a considerable lapse of time. Let the decree issue to shew cause why the bond should not be attended with.

No *laches* in
legatee.Assets suffi-
cient to pay
legacy.
Administrator
died insolvent.Breach of
bond patent.

Decree to issue.

Arches Court of Canterbury.

DECEMBER 11.

Church-rate. **STILL AND BUNN v. PALFREY.**—*Libel*.—This was a *scilicet* for subtraction of church-rate, brought by Letters of Request from the Commissary of Canterbury, by the churchwardens of the parish of Saint Mary the Virgin, Dover, against Daniel Palfrey, a parishioner. The *Libel*, which now stood for admission, pleaded that, in 1837, the parish church being in need of repairs, and the churchwardens being without funds, on the 30th November, pursuant to notice duly given, the parishioners met in vestry, when twelve parishioners were appointed and authorized to audit the churchwardens' accounts, and (according to the ancient usage and constant practice in the parish) to make a church-rate, on the Thursday next following; that a meeting of the parishioners so nominated accordingly took place on the 7th December, and the accounts of the then churchwardens having been audited, they made a rate of 4d. in the pound (the churchwardens being present and consenting), and D. P. was assessed at 14s. 6d.; that on the 13th December, 1838, a similar course was pursued, when a rate of 4d. in the pound was made, D. P. (the party sued) being one of the fourteen parishioners then appointed to audit the accounts and make the rate, and he was assessed at 14s. 6d.; that, in 1835, the parishioners in vestry having resolved that a certain piece of ground should be purchased for an additional burial-ground, authorized the churchwardens to cause a church-rate to be made to raise the means of completing the purchase; that at a vestry held 15th January, 1836, to authorize the borrowing of a sum to defray the expenses of fully completing the purchase, the churchwardens were authorized to borrow £1,200, to be paid by yearly instalments, with interest which were charged upon the church-rates, in accordance with the provisions of the Church Building Acts; that on the 22nd April, 1839, the sum of £1,000 remained unpaid of the aforesaid sums borrowed, to discharge a part of which, the then churchwardens, by virtue of the said

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Acts, duly made a rate of 3*d.* in the pound, for raising £452 for that purpose ; that D. P. was assessed at 10*s.* 10½*d.* ; that, in consequence of his refusal to pay the three rates before mentioned, he was summoned before two justices, when he disputed the validity of the rates ; that on the 10th January, 1840, a vestry was held pursuant to notice, to appoint persons to audit the accounts and to make a church-rate, who were to meet for that purpose on the 16th ; that on the 11th, previous to their meeting, D. P. and another parishioner delivered to one of the then churchwardens a requisition, signed by a considerable number of the parishioners, that he would call a vestry on the 16th, to rescind so much of the order of the 10th, as empowered the auditors to make a church-rate without previously submitting the churchwardens' accounts to a future vestry, and to order that no church-rate be allowed until it received the sanction of the parishioners in vestry ; that a vestry meeting was accordingly held on the 16th January, when resolutions to the effect of the requisition having been proposed, another resolution, by way of amendment, was proposed, to the effect, " that the vestry, fully relying on the integrity and judgment of the churchwardens and auditors, and being desirous of upholding the national church as by law established, do authorize them to proceed in carrying out the resolution passed in vestry on the 10th inst. ;" that this amendment was carried by a show of hands, and a poll being demanded by D. P., the votes for the amendment were 280, and for the original motion 146 ; that, in pursuance of the resolution of the 10th January, a *quorum* of the persons appointed (thirteen in number) made a rate of 4*d.* in the pound, D. P. being assessed at 14*s.* 6*d.* ; that at a vestry held on the 30th July, 1840, the churchwardens intimated their intention to make a rate for payment of a sum on account of the money borrowed for the purchase of the cemetery, and it was recommended to them by the meeting (at which D. P. was present) to make a rate at 2*d.* in the pound, which they accordingly did on the 3rd August, and D. P. was assessed at 7*s.* 3*d.* ; that on the 19th October, 1840, a church-rate was made by a *quorum* of the persons (twelve in number) appointed by

Dec. 11. the vestry to audit the accounts, of 4d. in the pound, D.P. being assessed at 14s. 6d.; that he had refused to pay the rates before mentioned, and on being summoned before the justices, disputed their validity; that D. P. had been requested to pay the several sums of money assessed to him (amounting to £3. 16s. 1½d.), but he had refused or neglected to pay any of them. The defendant did not now oppose the rates for the burial-ground.

May 22. *Phillimore, D.*, in opposition to the Libel. The proceeding upon the face of it is an extraordinary one. The rates claimed are six in number, four church-rates and two cemetery-rates, going back to 1837, and the mode of making the former is unprecedented. The parties suing do not set up that the vestry was select, or under a statute; but they plead a practice in the parish that persons are delegated to audit the accounts and make a church-rate. The rates themselves

Mode of making rate unprecedented.

Rates avowedly set forth that the money was raised "for and towards the necessary repairs of the church, and payment of the stipend, maintenance, or salary, of the present minister, or the minister who may be for the ensuing year, and also for the payment of the several salaries of the clerk, organist, and sexton, and other expenses relating to the church and connected therewith." The payment of the minister's stipend out of the rate is alone fatal to its validity.

Fatal to its validity.

Harding, D., on the same side. There are but three kinds of vestries,—common, select, and under particular Acts of Parliament. If the vestry in this parish is a peculiar one, the authority must be shewn. Then as to the usage, it is not alleged to be immemorial, but only an ancient practice.

Not shewn that a common vestry can delegate its functions.

It must be shewn that a common vestry can delegate its functions to another body, and a body indefinite in number. *Burnaby, D.*, in support of the Libel. It is true that the rates go back to 1837; but there has been no *laches*, and

No limitation as to time of suing for church-rates.

Ancient practice to appoint persons to make rate.

there is no limitation to a suit for church-rate. The vestry is not select, and we do not plead immemorial usage, but as ancient practice in the parish to appoint persons, from year to year, to audit the accounts and make a church-rate, and the defendant was appointed one of those persons, and acted as one of the *quorum* of five who made the second rate

which he now opposes. Before the magistrates, he disputed the validity of the cemetery-rate, which he does not now oppose. Why should parishioners not have the power to delegate to certain of their own body the duty of auditing the accounts and making a church-rate? It is true that the rates cover the salary of the minister, but as there is no endowment, no other fund exists; the church belongs to the parish, and unless the minister and other officers be paid, the church must be shut up.

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Parishioners have power to delegate.

Church belongs to parish.

Nicholl, D., on the same side. There is nothing illegal in the vestry of the whole parish delegating power to a subordinate body. We do not plead any custom, or a select vestry, but "ancient usage and constant practice." The vestry, *pro re nata*, appoints auditors and gives them power to make a church-rate, at a fixed time,—not a standing rate, but a rate necessary at the time. A vestry has power to make by-laws, with especial reference to the repair of the church. This doctrine is distinctly held by Lord Chief-Justice Tindal and the Judges in the Exchequer Chamber, in *Veley v. Barber*, who lay it down that a majority of a vestry have power to make a by-law which shall bind the whole parish, and a rate is of the nature of a by-law. It is said that the vestry has not power to delegate authority to an indefinite number. If it had been a permanent body, this might be true; but it is delegated from time to time, *pro re nata*. As to the minister's salary, the vestry had power to deal with the different items, and the Court is not to assume that it is illegal; the defendant must shew it to be so. [PER CURIAM.—The vestry can make a rate only for necessary repairs and legal purposes; you must shew that they are legal.] There was no objection made at the time. The parish is the patron of the living; there is no endowment and no fees.

Vestry gives power to auditors *pro re nata*.

Vestry may make by-laws.

Vestry had power over items.

Parish is patron of the living.

SIR H. JENNER.—I see no objection to a vestry delegating, *pro re nata*, the office of auditing the accounts and proposing a rate, to a number of persons nominated for that particular purpose, reporting to the vestry; but it is a new feature, that here is no report to the vestry; the decision of these persons is conclusive. The question is, whether a

JUDGMENT.

Dxc. 11. body of persons, nominated by the whole vestry, has the power of charging the church-rates with the payment of the minister's salary. This is a most important point, and it seems admitted that it cannot be done under the general law; it must, therefore, be under the particular circumstances of this parish, which are not set forth. The Libel must be reformed, and I should wish to know the proportion of the minister's salary to the amount of the rate.

Libel to be reformed.

Libel as reformed, and additional articles.

The Libel was reformed, and additional articles were brought in, which pleaded that the church of Saint Mary the Virgin is a very ancient edifice, of Saxon origin, belonging to and in the patronage of the inhabitants of the parish, in whom (in vestry assembled) the election of the minister is vested; that the duty of providing and paying stipend to a minister for performing the spiritual duties of the parish hath at all times been incident to the possession and patronage of the church; that there are no tithes or glebe, and the minister, besides Easter-offerings and fees for occasional duty (which together are of small amount, receives a yearly stipend from the inhabitants, the amount whereof is agreed upon at the time of his appointment; that such stipend, so agreed upon, for 60, 100, 200, and 300 years last past, hath been raised, together with the sums necessary for the repairs of the church and other expenses incidental to the office of churchwarden, by a rate upon the inhabitants, and that upon the election and appointment of the Rev. John Maule, the present minister, on the 21st November, 1817, the stipend agreed to be paid to him was fixed at £200 *per annum*, which is raised by a rate on the inhabitants; and reference was made to the original minutes of the proceedings of the vestries from 1611 to 1817.*

* The following are copies of some of these exhibits:—"Memorandum that the xxth of June, 1611, the accountes of Thomas Obree and Richard Dawkes, churchwardens, weare adited, as weare the booke for the mynesters waiges, allso the ses for the gallery and mony otherwise reserved [received?] by them of the ould churchwardens, as maye appear by the several bookes. First, we find that they reserved upon the book:

Phillimore, D.—On the face of the rate, the Court cannot sustain its validity. The leading principle of church-rates is, that they are for the necessary repairs and sustentation of the church. There never was an instance of a rate sustained which included amongst its items the minister's salary. In *Tann and Clitherow v. Owen*, a case in the Consistory Court

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ARGUMENT.

No instance
of a church-rate
including mi-
nister's stipend.

booke for the mynesters waiges, in A.D. 1610, the some of £60. 8s. 7d. More we find they reserved in stoke rentes oulde debtes, the some of £26. 19s. 10d. *Item*, more they have reserved upone the communion booke, £16. 3s. 8d. *Item*, more they have reserved upone the ses for the gallery, £29. 16s. 6d. Some totall is £133. 8s. 7d. *Item*, we find that they have paid oute of these resetes for the mynesters waiges and other charge in that booke apering, £87. 7s. 8d. *Item*, more we find they have laid out for the billding of the gallery and repairing of the pewes, as aperes by that booke, £47. 10s. 4d. Some totall is £134. 18s. 0d. So we find the paiments exced the resetes the some of £1. 9s. 5d. dewe to the aforessaid churchwardens."

"The 28th day of June 1629. The parisheners of St. Maryes did meete and assemble together after evenyng prayer to confirme and main-
tayne the ancient custom of making the seasse for the mynesters wages, and reparon of the church, and it was then agreeed by the most voyces of the parisheners, that the churchwardens shall be warranted by them for the gatherynge of the assessments formerly made and to be made here-
after respectively, and also to agree to allowe the suites against those that refuse to pay theyre assessments."

"Att an assembly of the parishioners of the pish of St. Marie in Dover, on Sunday, the 25th day of February 1654, after sermon ended in the afternoone, upon notice given, according to the usage and cus-
tome of the said parish. Att the same assembly, the said parishioners doe elect and choose Mr. Nathaniel Barrey to be minister of the said parish, and doe agree and promise to give and allowe unto him the sume of £100 yearly and every year, for soe long time as hee shall con-
tinue minister of the said parish, he, the said Mr. Barrey, pforming all the offices of a minister, according to the order of the gospell. And further it is agreed that the said Mr. Barrey shall be settled and con-
firmed minister of the said parish by authority, according to the auntient usage and custome of the said pish, and that his meanes shall be raised as formerly by way of assessment upon the pishioners of the said pish, and to be paid unto him quarterly."

At a meeting on 20th April, 1671, the parishioners agree to allow Mr. Lodwicke £80 a year, so long as he shall officiate as minister.

At a meeting on 20th November, 1698, the before-mentioned Mr. Lodwicke was dismissed, for "neglecting and refusing to read the common prayer and preach in the parish church for six Sundays suc-

Dec. 11. of London,* the judge pronounced against a rate in Belm Green parish, on the ground that it included the salary of the minister, observing that, "unless the power be conferred by Act of Parliament, it is not competent even to the majority of a vestry to make a rate for an additional income to the incumbent."

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A decision adverse.

Harding, D., on the same side.—There are three objections to the Libel: first, that the mode of making the rate not in vestry, is bad; second, that the rate cannot include the minister's stipend; third, that such a rate, including the stipend of the minister, cannot be made by a committee of the vestry; it must be by the vestry itself.

Burnaby, D.—There is no authority for saying that these rates are not *primâ facie* valid. The case of *Tann v. Owen* was different in its circumstances from the present. A minister's stipend is a due for adjudication of Ecclesiastical Court. *Gilby v. Williams*; *Gooche v. Bishop of London*.† The parishioners in this case

cessively," the minute premising that "the electing, continuing, and dismissing of the minister of the parish is in, and of common right do belong unto, the parishioners."

At a meeting on 17th March, 1705, of the parishioners, "there was complaint made, and several witnesses were examined, touching seven misdemeanours committed by Thomas Dale, clerk of the parish, of ill and loose living;" whereupon he was discharged.

At a meeting on 4th August, 1772, the parishioners elected by a majority of votes the Rev. John Lyon, minister, on condition that he constantly resided in the house purchased by the parishioners for the minister, and preached every Sunday, &c., and it was agreed that he should be paid by the churchwardens, "out of the rate or assessment made and to be made for the repairs of the church and the maintenance of the minister, the sum of £80 a year, "together with all fees and perquisites received by his predecessors."

At a meeting on 16th November, 1812, the Rev. John Mank was appointed assistant minister, with a stipend of £80 a year.

At a meeting on 21st November, 1817, the Rev. Mr. Mank was elected minister, in the room of the Rev. Mr. Lyon, deceased, with a yearly stipend of £200, to be paid by the churchwardens "out of the rate or assessment made and to be made for the repairs of the church, and the maintenance of the minister," so long as he should reside in the parish and do his duty as minister in his own proper person, and no longer.

* See 7 *Monthly Law Mag.*, 86. † Crq. Jac. 666. ‡ 2 Str. 373

have the right of appointing the minister, and claim the power of dismissing him; they annex conditions to his acceptance of the office; there is no stipend attached to it, no endowment, no glebe; no other means exist of providing for the minister, which is the duty of those who have the patronage. If this suit cannot be maintained, the church must be shut up; the Court will, therefore, exercise a jurisdiction, and leave it to the other party to move for a prohibition if he think proper.

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Parish bound to provide a stipend.

Nicholl, D., on the same side.—It is not necessary to plead custom or prescription, since the parish can make a by-law in a matter for the general good. In *Tann v. Owen*, the local Act defined the objects to which the rate was to be applied, and the fund out of which the minister was to be paid.

THE COURT took time to consider the case, desiring to have the books, in order to see when the salary of the minister was united with the church-rate, since it appeared that, at one time, the salary and church repairs were kept distinct.

Cur. adv. vult.

SIR H. JENNER.—In this case, the rates for the payment of money expended in the purchase of a burial-ground are not opposed; but all the articles of the Libel relating to the church-rates are opposed, as well as the additional articles, affording more information to the Court in respect to the mode of proceeding in the parish than was given in the original Libel.

Dec. 11.

JUDGMENT.

The circumstances of this parish are very peculiar, as well as the course of proceeding which has been pursued there for some centuries in making rates; and although it appears that the rates have been made in this manner for so long a time, their validity has never before been called in question. But the party sued is, nevertheless, entitled to take objections thereto, and to have his objections weighed with attention by the Court, and to have them answered.

Circumstances of parish peculiar.

The churchwardens describe themselves, at the heading of the Libel, as successors of J. G. S. and J. H., who were the successors of T. H. E. and K. H., who were the successors of T. S. and T. W., who were respectively churchwar-

Dec. 11. dens at the times when the several rates were made; the
Still v. Palfrey. Libel being for the recovery of rates which should have
 been paid to their predecessors in office. The consequence
 of including six rates in one proceeding (four for the church
 and two for the cemetery) is, that it has given rise to pro-
Expensive na- ceedings which, if the rates can be maintained, may be at-
ture of suit. tended with considerable expense, the Libel being very long
 (thirty-five articles), with seven exhibits, and the two addi-
 tional articles having ten exhibits. If, therefore, there is
 any real and valid objection to the rate, it is very desirable
 that the suit should be stopped *in limine*, before any con-
 siderable expense is incurred.

Objections to The objections to the Libel have been reduced to three:
Libel. first, that some of the rates are of very long standing, and
 that the question as to their validity ought to have been
 brought to issue long ago; second, that the rates were not
 made in vestry; and, third, that some of the purposes for
 which the rates were made were not properly the subject of
 church-rate.

First objection. With regard to the first objection, the Court does feel
 that it is a circumstance which has been very properly
 brought to its attention, inasmuch as it is not only produc-
Inconveni- tive of very great inconvenience to the party over whom the
ences of delay proceedings were pending during all the time, but also to
in proceeding to the rest of the parishioners, who had been called upon to
recover rates. pay rates, for four years, which might turn out to be illegal
 and invalid; consequently, they would have paid them at
 their own wrong. Nevertheless, the Court is not at liberty
 to refuse to entertain a suit for the recovery of such rates, if
 there is no valid objection to them. But it must be under-
 stood by churchwardens in all parishes, that the Court is not
 inclined to give them any assistance for the recovery of rates
 of long standing, and that it is their duty to adopt the ear-
 liest proceedings to recover a rate where a party objects to
 its validity. In the present case, there may have been some
 reasons for the delay, and peculiar circumstances may have
 influenced the former churchwardens not to bring forward
 the questions so early as they otherwise might have done.
 However, the Court cannot say that, in this particular case,

Churchwar-
dens should
adopt the ear-
liest proceed-
ings.

the delay is a radical objection to the enforcement of the rate, if otherwise due.

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Second objection.

The second objection is to the manner in which the rate was made, not in vestry, but by a certain number of parishioners appointed by the vestry to audit the churchwardens' accounts and to make a rate:—an objection which applies to the whole of the four church-rates, for they were all made on the same principle, though there may be some difference as to minute particulars, such as the number of persons appointed. There is this distinction between what was done in January, 1840, and in preceding years, that a resolution was then proposed by Mr. Palfrey, who had acted, on a previous occasion, as one of the auditors, "that no church-rate be allowed until it has received the sanction of the parishioners in vestry assembled." That resolution, however, was negatived by a show of hands and also by a poll, and an amendment was carried, which was in effect a resolution to adhere to that which had been the constant practice in the parish for many years. The motion so made by Mr. Palfrey was not at all an improper motion, nor unreasonable in itself, because it was to do that which is customary in every parish but that of St. Mary the Virgin, Dover; and perhaps it would be the most desirable course, that, after the persons empowered had audited and examined the churchwardens' accounts, and made a rate, the parishioners in vestry should pass the accounts, and that the rate should be confirmed by a resolution. But still the question remains, whether the practice adopted in this parish, and acted upon so long, is or is not such as to render a rate so made invalid.

It is said that a rate, to be good and valid, must be made by the parishioners in vestry assembled, unless by statute, or by a select vestry, or by prescription or custom from time immemorial; that, as neither is pleaded, these rates, having been made, not in vestry, but by a select body, cannot be maintained. It is certainly not alleged that there has been an immemorial custom in this parish; but it is pleaded that there has been "an ancient usage and a constant practice," and properly so pleaded, for this reason: that where rates have been so made, and sanctioned by the parish for

No immemorial custom, but ancient usage.

- Dnc. 11. so many years, under an ancient custom, it shews that the parishioners had not been taken by surprise ; that it was no novel mode of proceeding, but one which was approved of and adhered to by a large body of the parishioners, as not an inconvenient mode of discharging the burden which the law casts on them, namely, of providing by a rate for the repair of the church, and for the things necessary for the due performance of divine service, and which mode had been adopted by the parishioners as a by-law, *pro re natâ*, for there was no fixed and definite number of persons appointed to make the rate, but a certain number was selected, according to circumstances, at the time ; and this is of the nature of a by-law. As it is stated by Lord Chief Justice Tindal, in the Braintree case, a parish is a corporation, so far as regards the making of rates for the repair of the church, and "the power of making by-laws is incident to corporations aggregate;" and he observes that "Lord Coke lays it expressly down, 'that the inhabitants of a town may without custom make ordinances or by-laws for the reparation of the church, or highways, or any such thing, which is for the general good of the public; and in such cases, the greater part shall bind the whole, without any custom.'" I do not, therefore, see any thing improper in the mode adopted. If a part of the vestry had taken upon themselves to assemble, and to make a rate without authority imparted to them by the whole body of the parishioners, it would have fallen within the principle acted upon in the Braintree case: it would have been a rate made by a portion of the parishioners, without authority and notice of meeting. But there is this most material difference between the present and the Braintree case, and which essentially distinguishes the two: namely, that, whereas in that case, the churchwardens took upon themselves to make a rate of their own authority, and without notice ; here, the persons selected to make the rate were appointed for that especial purpose by the whole body of the parishioners, after notice duly given of the purpose for which they were convened together, namely, to appoint persons to make a rate. If, therefore, the question as to the admission of the Libel rested upon the second objection !
- Still v. Palfrey.*
- Parish may make a by-law, *pro re natâ*.
- Braintree case.
- Distinguished from the present.
- Objection not valid.

should be inclined to think that the Court must admit the Libel, and if proved, to pronounce for the validity of the rate.

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Still v. Palfrey.

But there is another objection, in respect to which I have much difficulty; namely, that a considerable part of the rates so made was to be applied to the payment of the minister's stipend. The rate itself purports that it was to be raised "for and towards the necessary repairs of the church, and payment of the stipend, maintenance, or salary of the minister;" and the question is, whether the providing a stipend for the minister out of the church-rate is a legal objection to the rate?

Third objection.

Rate purports to be for payment of minister's stipend.

From the additional articles, it appears that, for a great number of years past, the minister's stipend has been paid out of the church-rates; that, in 1817, when the present minister was elected by the parishioners (to whom the patronage belongs), it was agreed, at a vestry called for that purpose, that his stipend should be £200 a year, in addition to the surplice fees; and it is pleaded that this stipend had been paid ever since out of the church-rates; that former ministers had received from £80 to £200 a year, and they had been always paid from the same fund, and the accounts of the churchwardens, in which these sums were charged, had been allowed.

Has been paid out of rates;

It cannot be denied that this is not a usual mode of providing for the payment of a minister of a church, to make his salary or stipend an item in a church-rate; and nothing but the peculiar circumstances of this parish could have induced the parishioners to consent that it should have been so long included in the church-rate. The character of the preferment in this parish is not very accurately described in any of the articles: nothing is said with respect to it in the original Libel, but the additional articles plead the circumstances, and the exhibits annexed to those articles tend to establish them. But it is certainly a novel mode of providing for a minister; and since an objection has been taken, the question is, whether, under these circumstances, a rate for such a purpose can be maintained?

Not a usual mode.

Nature of the preferment.

The Court, as I observed, is not accurately informed what

Dec. 11. is the true character of the preferment in this parish, and the mode in which, or the time when, the parishioners came into possession of the patronage ; all that it can collect is that it is neither a rectory nor a vicarage ; that there is no endowment, and no tithes belonging to the church ; the Court is not informed whether, in fact, Mr. Maule has a license from the ordinary or not ; though I presume it must be so, as the churchwardens came in the usual course to the Commissary Court to confirm the rate.

The Libel pleads that the minister's rate has always been collected with and paid out of the rate for the repair of the church ; but I apprehend that originally there must have been two rates, one for the minister and one for the repair of the church ; for I find that, in the minute of 1611, mention is made of " the book for the minister's wages," as well as " the communion-book," and " the cess-book for the gallery." It is quite clear, therefore, that, at that time (1611), the book for the minister's stipend (or wages, as it was called) was separate from that for the general fund applicable to the repairs of the church. In subsequent years, it seems that this plan of keeping the accounts was abandoned, and the rates have been collected together, and out of the common fund, a sum was paid to the minister. Now the sum of £200 paid out of £600, the amount of the rate raised in 1837, is very considerable, being one-third of the whole rate. But it is said, that this parish is differently circumstanced from others ; and so it undoubtedly is. The parishioners are bound to provide a minister, the patronage being in them : whether they derive any benefit in a pecuniary point of view from the patronage does not appear ; but they, as the patrons, are bound to provide a minister and to pay him ; to pay him a stipend for the performance of divine offices therefore, little and, therefore, it may be said, it can make little difference whether the rate was collected by the churchwardens as a church-rate or as a separate rate ; and so it would seem from the first view ; and that Mr. Palfrey being one of the parishioners, it could make little difference to him whether he was assessed to the minister's salary in one separate form, or included in a general rate under the denomination of church-

Originally two rates, a minister's and a church-rate.

Subsequently rates collected together.

Stipend one-third of the rate.

Parishioners bound to provide a minister ; and to pay him ; therefore, little apparent difference whether rates collected separately or not.

rate; and I should be very much inclined to adopt that mode of reasoning, if there were not this distinction between the cases; that, if this is not a legal charge in a church-rate, this Court has not the power to enforce the payment of the minister's stipend, as part of a church-rate. It is a different thing for the Court to entertain a suit for ecclesiastical dues to the minister, *eo nomine*, and to enforce the payment of such dues as part of a church-rate. Mr. Maule's dues might be sued for as ecclesiastical dues; cases have been cited to support that position. In *Gilby v. Williams*, which was for a prohibition in a case where a party had sued in the Ecclesiastical Court for a sum due to him as minister, and which had been paid for many years, the prohibition was denied, because it was a pension, and triable in the Spiritual Court. Again, in *Gooche v. Bishop of London*, the archdeacon of Essex applied for a prohibition to the Ecclesiastical Court, in which he had been sued by the bishop for a due as a prestation, for the exercise of his exterior jurisdiction, and no prescription was pleaded; the prohibition was denied, on the ground that it was not necessary for the bishop to plead prescription, as he was entitled *ab antiquo*, and as it had been only laid in general, there was no ground for prohibiting the Ecclesiastical Court. These and other cases are strong to shew that ecclesiastical dues may be sued for in these Courts; but they go no further; they do not shew that they may be sued for in the shape of a suit for subtraction of church-rate. No precedent has been cited in which such a charge has been enforced by any Ecclesiastical Court as part of a church-rate, and I am not prepared to say that it is an item that can be included within the purposes for which a church-rate is made, and therefore I am not at liberty to say that, if all the facts pleaded were proved, I should be authorized to enforce the rate. It is unfortunate that the objection should have been raised, as it may involve the parish in very considerable expense, and if the minister's stipend is not paid in this way, it must be paid in some other, for the parish cannot escape from the payment of a stipend to the minister, and whether it is to be recovered by an action of *indebitatus assumpsit*, or in

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But a rate containing an illegal charge cannot be enforced.

Minister's dues might be enforced in another form of suit. Cases.

Do not shew that dues may be sued for in suit for subtraction of church-rate.

Unfortunate that the objection has been raised.

DRC. 11. some other form, the parishioners are bound to provide a minister, and to find the means of paying a stipend to him for the performance of divine offices.

Still v. Palfrey.

Rate cannot be enforced in this suit. I am, therefore, of opinion that I cannot enforce the payment of the rate in a suit of this description: as to the power of the Court may be in a suit of another form for the recovery of ecclesiastical dues, I give no opinion.

So much of am, consequently, under the necessity of rejecting all the Libel, and the additional articles, rejected. articles of the Libel relating to this part of the rates, which do not include the cemetery-rates, and of course the additional articles and the exhibits annexed thereto.

Further proceedings.

Jan. 11.
Defendant pays cemetery-rates.

The churchwardens asserted an appeal from the above decision, which they, however, abandoned, and on the first Session of Hilary Term, 1842, the defendant alleged that he had paid the cemetery-rates, and claimed to be dismissed with his costs.

Burnaby, D., for the churchwardens.—The defendant resisted all the rates, some of which he has now thought proper to pay. The Libel was not rejected in the first instance as it would have been had the demand been unjust and inequitable; the Court required further information as to the circumstances of the parish, and it appeared that this mode of rating had been acquiesced in for 300 years. The party himself has been one of the auditors, and he never objected to pay the rate on any of the grounds he has taken here.

Not entitled to his costs.

If he claims his costs, I claim our costs for the cemetery-rates. We abandoned our appeal on consideration of his paying those rates.

Phillimore, D., *contra*.—On every principle of equity and justice, the Court is bound to give us part of our costs, at least. Here were four church-rates sued for in one Libel, an inconvenient practice, leading to expense. Nothing less expensive than a church-rate suit properly carried on. If churchwardens succeed, it is usual to give them the costs; if they fail, it is but common justice to the other party to give him his costs.

But common justice to give costs.

PER CUB.

SIR H. JENNER.—The question, as the case now stands

is, the admission of the Libel as reformed. The Libel must be first admitted, and until the party has given an affirmative issue and paid the rate, he cannot pray to be dismissed. Dec. 11.
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(Subsequently, the Libel was brought in and admitted as reformed; the Proctor for the defendant gave an affirmative issue, and the Proctor for the churchwardens acknowledged the receipt of the cemetery-rate, and declared he proceeded no further.) Application
irregular in
form.

SIR H. JENNER.—I think that unnecessary expense has been occasioned by the delay of the churchwardens, and the suing for four rates in one Libel. If they had proceeded for one rate, at the time it was due, there would not have been any thing like the expense incurred, and the churchwardens are not justified in point of law in this course. The party has successfully resisted the rates called church-rates, as distinguished from the cemetery-rates, and the churchwardens, having so far failed and having caused expense by their delay, are liable to pay these costs, and if those rates had been the only rates sued for, the Court would have condemned the churchwardens in all the costs. But they were not the only rates, and the party, having made no tender, compelled the churchwardens to take proceedings for recovering them. I am, therefore, of opinion to condemn the churchwardens in the costs occasioned by that part of the proceedings which relate to the rates called church-rates, and to condemn the other party in the costs occasioned by his refusal to pay the cemetery-rates. It is difficult to know how to distinguish one from the other, and the question is, whether it would not be better to give a *sum nomine expensarum*. JUDGMENT.

Churchwardens in error,

as well as defendant.

Both parties condemned in portions of costs.

(The parties, however, agreed that the costs should be taxed, and the Court so directed.)

Prerogative Court of Canterbury.

DECEMBER 16.

Will lost, or
stolen; a copy
admitted to
probate.

IN THE GOODS OF WILLIAM COUSINS, DEC.—*Motion*—
The deceased died 23rd August, 1840, having duly executed a will, dated 27th July, 1840, appointing J. H. and A. P. executors. A few days after his death, the widow gave the original will to J. H., one of the executors, to copy, for her satisfaction, before it was brought into the Registry, which he did. In November, A. P., the other executor, gave the will to the solicitor, with a request that he might have a copy made. The solicitor gave the will to his clerk, with directions to copy it. The clerk, before he had completed the copy, placed the original in his desk, on leaving the office, and next morning it was missing. Endeavours had been made to find the will, and a reward of ten guineas had been offered for it, but without effect. The copy made by J. H. was now produced, with an affidavit made by him that it is a fac-simile, except the following memorandum added by himself at the foot: "This probate [*sic*] of the will of Wm. C. was taken by me at the request of Mrs. C. 31st August, 1840." An affidavit of the attesting witnesses to the will proved its due execution. The personal property was £3,000.

MOTION.

Haggard, D., moved for probate of the copy, limited to the original will was brought in.

JUDGMENT.

SIR H. JENNER.—Under the circumstances, the Court grants a limited probate of the copy of the will to the executors.

A will, signed
in the margin,
not at the bot-
tom, through
misapprehen-
sion, refused
probate.

IN THE GOODS OF JUDITH WAKELING, DEC.—*Motion*—
The deceased died 10th October, 1841, leaving a will dated 14th August. The solicitor who prepared the will, a few days before (leaving blanks to be filled up by her), told the deceased, when he gave it to her, that she must execute it by signing her name at the bottom, and that the witnesses might sign in the margin. She misapprehended this direc-

tion, and signed her own name in the margin, on one side of a large sheet of paper. It appears that the will was subsequently seen by one of the executors, who told her that it was not properly executed; but she replied that she had been told how to execute it, and that it was all right. The attesting witnesses proved that the will was executed in their presence.

Dec. 16.

Waking, dec.

Haggard, D.—The question is, whether, the deceased having executed the paper in this manner, the Court can grant probate of it. Although she did not sign at the foot or end, she signed after the will was ended.

Signed after the will was ended.

SIR H. JENNER.—This is an unfortunate case, in which it is painful to the Court to know that it must defeat the intention of the deceased, through a mere misapprehension on her part. The only question is, whether the deceased, having signed her name in the margin of the paper, can be said to have signed “at the foot or end thereof.” If the words had been, “at the time the will was ended,” the case would have been somewhat different; but I cannot say that the signature is at the foot or end. It is very distressing to the Court thus completely to defeat the intentions of the deceased. I do not know whether, in the present case, it is of much consequence; but the principle is the thing. I must reject the motion. It is a technical objection, certainly, but it is one which applies to cases of real as well as personal property.

JUDGMENT.

Not signed at the “foot or end.”

Motion rejected.

IN THE GOODS OF THE REV. ROB. FARINGTON, D. D., DEC.—*Motion.*—The deceased, rector of Saint George in the East, died 18th September, 1841, having made a will, dated 6th June, 1822, by which he gave his whole property to his nephew, Captain Wm. Farington, with directions that he should give such a proportion of it as he supposed he (the deceased) would give, to his niece, Mrs. Frances Coxe. This paper was signed, but not witnessed, and the following words formed the concluding paragraph: “This is a sketch of what I design to do respecting my property; but should I be prevented from making a more minute and formal disposal of it, I sign this as my last will and testament.” After diligent search amongst the deceased’s papers, and ad-

A will of 1822, revoked by a pencil-writing without date.—Probate of the former, at first, refused, but afterwards, on circumstances affording a presumption that the pencil-writing was made after 1836, granted.

Dec. 16.
Farington, dec.

vertisements in various newspapers, no more formal will could be discovered, and no paper of a testamentary nature was found besides the before-mentioned will, and two scraps, which were in a pocket-book of the deceased. One of the scraps was an unfinished sketch or draft of the heading of a will. The other was written on the two sides of a small scrap of paper, forming apparently a portion of the outer sheet of a letter, the wafer seal remaining on it. This paper is signed, but without date. The writing, which is in pencil, is to this effect: "I do hereby revoke [*"cancel," interlined*] the draft of a will which I made in 1822, and is in some of my drawers, and I leave all my property of every description to be divided equally [*"exclusively," interlined*] between my nephew, Capt. Wm. Farington, R.N., and my niece, Esther Frances Coxe, for her sole and exclusive right and disposal, R. Farington." Capt. F., the sole executor named in the will, stated that he "had reason to believe" that this paper was written about the beginning of 1844, and Mrs. Coxe, who is named in it with him as universal legatee, did not propound the paper, and consented to probate of the will of 1822 to Capt. F. The personal property was between £20,000 and £25,000.

Dec. 6.
 Motion.

Sir J. Dodson, Q. A., moved for probate of the will of 1822 to Capt. F., the sole executor.

JUDGMENT.

SIR H. JENNER.—There is no doubt that, if no other testamentary paper of subsequent date had been found, the paper of the 6th June, 1822, which contains a complete disposition of the property, and is signed by the deceased, would have been entitled to probate as his last will and testament. But it appears that another paper was found in the deceased's pocket-book, without date, but signed by the deceased, which purports to revoke or cancel the will of 1822, which, as he says, was to be found in some of his drawers. In this paper there is an equal division of the property between Capt. Farington and Mrs. Coxe, instead of leaving it to the option of the former what proportion of the property Mrs. Coxe should have. Now this paper is very fairly written, considering that it is written with a pencil; it has no date, but it may possibly be a good and valid disposition of the property, and a revocation of the paper of 1822. Now it is

stated by Capt. Farington that he has some reason to believe that this paper was written some time in the present year (1841); but there is no reason assigned, and nothing before the Court to bear out that averment. The paper may have been written after 1838, but possibly it may have been written before. The will is dated in 1822; sixteen years is a long time before the new Act came into operation, and he died three or four years only after it took effect. The property is large, and although, it is true, Mrs. Coxe and her husband consent to probate of the former paper passing, and do not propound the other paper, I do not see that the Court has any authority to make a will for the party. Why should I pronounce that the will of 1822 is the will of the deceased, and that the paper by which it purports to be revoked and cancelled is not the will of the deceased? This paper is found in a pocket-book—it is not stated for what year it was; that may be some guide to the Court. I am not prepared, at the instance of a party, to make a will for the deceased. If there is any reason why it is probable that the paper was written in 1841, it should be stated to the Court. Under the circumstances, I reject the motion.

Dec. 16.

*Farington, dec.*Motion re-
jected.

On the By-Day, *Sir John Dodson* renewed the motion upon a further affidavit by Capt. Farington, setting forth a variety of circumstances upon which he founded his belief that the deceased had written the paper in pencil in 1840 or 1841, and stating that the book in which the paper was found was a mere case, without a calendar, and contained papers of recent dates. Mr. and Mrs. Coxe now appeared by a Proctor, and declined to propound the paper, consenting to probate of the paper of 1822.

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Further affi-
davit.

SIR H. JEMNER.—When this case came before the Court on the former occasion, as Capt. Farington prayed probate, contrary to the interest of another party, of a paper described as a “sketch,” which the paper found in the pocket-book purported to revoke, the Court looked into the affidavit to see the grounds upon which it was supposed that the paper revoking the will of 1822 had been written in

JUDGMENT.

DEC. 16. 1841; but there was a total blank. The pocket-book is now produced, and turns out to be a mere case, without a calendar, containing papers of all dates, and furnishing no information as to the date when the pencil-writing was made.

Farington, dec. But Capt. Farington's affidavit now sets forth various circumstances, not very strong, certainly, but sufficient to satisfy the Court that it was written after 1838. He states that the deceased had always entertained great regard and esteem for him, and had given him reason to believe that the whole property was to be his, as by the will of 1822; that the deceased paid a visit to the Isle of Wight in 1840, at which period he manifested great but unreasonable irritability and displeasure against him (Capt. F.), although they had before been upon the best possible terms. Under these circumstances, it is not improbable that the paper may have been written at this time, and there is nothing to shew that it was written before 1838. Under the circumstances, I am of opinion that probate of the will of 1822 should pass.

Circumstances satisfactory.

Probate granted. Capt. Farington.

CAPACITY.— **WELLESLEY V. VERE AND KNOX.—Cause.**—This was a will of 1822, bearing marks of eccentricity, pronounced for, in the absence of adminicular proof of unsoundness. — Application to admit evidence taken in a former cause, refused.

WELLESLEY V. VERE AND KNOX.—Cause.—This was a business of proving, in solemn form, the will of Edward Hope, Esq., by the Rev. Henry Wellesley, clerk, the universal legatee, against James Joseph Hope Vere, Esq., the brother, and the Hon. Jane Knox, the sister, of the deceased, the only next of kin. The testator died on the 4th of November, 1836, at the age of 44, a bachelor, leaving personal property of the value of about £12,000. The paper in question is dated "London, August 13, 1822," and is in the following effect: "In the name of God, Amen.—I, Edward Hope, do leave and bequeath every thing I possess under the sun to Henry Wellesley, a younger son of the Marquess of Wellesley, who is brother to the Duke of Wellington." The paper is in the deceased's handwriting, but is not signed at the end, nor attested. A will of the deceased dated July 27, 1835, regularly executed and attested, bequeathing the entire property to the Rev. Mr. Wellesley with the exception of £3,000 to the deceased's servant.

Louise Goddard, was set aside; on the ground of insanity, by a sentence of this Court,* affirmed by the Judicial Committee of the Privy Council. The present case came before the Court on an Allegation (in the nature of a *condidit*), on the part of the universal legatee, who prayed administration, upon which Allegation two witnesses had been examined, no plea having been given in on the part of Mr. Hope Vere, the only party who appeared to contest the validity of the will, the proceeding as respected the Hon. Mrs. Knox being *in pnam*. Before the case was argued,

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Wellesley v.
Vere.
 1838.
 May 29.

Haggard, D., for Mr. Hope Vere, submitted that he had a right to refer to the former case, which was on the records of the Court, and to move that the papers in that suit (in which two of the parties were the same as in the present), namely, the pleas and depositions, might be before the Court in this case, in order that it might see what was the state of the deceased, and the circumstances, which would illustrate the present question as to the validity of this paper.

Proceedings
 in former cause
 invoked.

Applicable to
 the present.

Burnaby, D., for Mr. Wellesley, objected to the introduction of the proceedings in another cause; the present cause was between different parties, and to introduce the former proceedings would be to argue that case over again.

Parties in this
 case different.

Addams, D., on the same side.

SIR H. JENNER — On the third session of Easter Term (5th May), the Proctor for the Rev. Henry Wellesley appeared for him, and alleged him to be the universal legatee in a will of the deceased, dated 13th August, 1822, and prayed administration to his party, as no executor was named in the will. The Proctor for Mr. Hope Vere, brother and one of the next of kin of the deceased, appeared for that gentleman, and declared that he opposed the will propounded by Mr. Wellesley. The cause has now come on for hearing on the Allegation given in by Mr. Wellesley, and the evidence of two witnesses, there being no Allegation on the other side. The prayer of the Proctor for Mr. Wellesley is, that I would pronounce for the validity of the will, and decree administration to his party; and I have a prayer from Mr. Hope Vere's Proctor, that I would pronounce that the other

Proceedings
 in this case.

Prayers of
 both parties.

* *Goddard and Wellesley v. Vere*: see 2 *Monthly Law Mag.*, 291.

- Disc. 16.** Proctor has failed to prove his case, and that, so far as appears, the deceased is dead intestate, and that I would decree administration to Mr. Hope Vere. So the cause stood up to this moment; and now, at this late period, the Court is asked, in effect, to rescind the conclusion of the cause, in order to admit the evidence in the former cause between Mr. Wellesley, one of the parties, and Mr. Hope Vere, in which Mr. Wellesley failed to establish the will of 1835, the Judicial Committee of the Privy Council having affirmed the sentence of this Court. What took place in that Court is not before me, and although the paper of 1822 (the one in question) is annexed to the affidavit of scripts in that cause.
- Grounds of refusal.** I cannot let the evidence in that cause into this; although it may be between some of the same parties, it relates to a very different period of time, and if I were to accede to the application, the whole case must be re-opened to receive the evidence on behalf of Mr. Wellesley in the former case.
- Novel application.** is a very novel application, and it is a great misfortune that it was not determined upon at an earlier stage of the case.
- Refused.** I cannot accede to the application.
- Argument.** *Haggard, D.*—Looking at the paper propounded, its character is so peculiar, that it requires more evidence than that of two witnesses to the handwriting; it is impossible to read without being struck with the marks it bears of haste, impulse, and eccentricity. It is also an informal paper, and therefore does not fall within the principles applied to complete and perfectly formal documents; it is signed not at the bottom, but at the middle, and written on a scrap of paper. There is no averment of its place of deposit; we do not know where it came from; it is not alleged that, during the interval between its date and the deceased's death, it was preserved by him. The deceased at its very date is proved by one of his letters to his sister, dated 12th February, 1822, six months only before the date of the paper, to this effect:—
- Letter from deceased.** N.B. I do not mean to accuse you of giving bad advice. X dear Jane:—I send you this letter for the purpose of bestowing upon you my most hearty malediction and curse. About 17

years ago, you were regularly consulted by me relative to a disorder in my nose. You gave me your advice, and I acted in consequence. I applied medicines to it, by my apothecaries' advice, that had the consequence of injuring it in a most dreadful manner, made it intolerable to myself, and odious to look at. Why, then, did you not sound the alarm when you saw I was injuring it? And if you did *not* perceive it, how comes that about, when all my other friends did, and remarked it to me? Look to the consequence: my fortune and prospects are ruined for life, as I can now neither stoop to read nor write without pain; consequently, the law and every thing else is put an end to, for I could neither even be a secretary of state, ambassador, nor any thing else that requires writing. I put it to you, therefore, how you absolve yourself to God and your own conscience, for letting your nearest relations go to ruin before your eyes. You have already told me once that you saw no change take place. I ask you, then, in God's name, why are you so blind to the most important things in life? But I remember very well it was always said that nothing made the least impression upon you, and I believe, from my soul, now that it is the case. I fully believe (for I have already seen it) that the gossamer and trash of this life are the only things you care for. All this may be severe, but I consider it my duty to write it.

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Wellesley v.
Vers.

How is such a paper supported? entirely by proof of handwriting,—certainly, at variance with the doctrine of this Court. Nothing is proved as to the sanity of the deceased, so necessary where the paper is not only informal, but so peculiarly worded, and when so long an interval of time has elapsed, and there is nothing to connect it with the deceased but the handwriting: [PER CURIAM.—The capacity of the deceased has not been attacked in plea.] It is impossible to obliterate from the records of the Court the evidence in the other cause, in which the history of the deceased is investigated from an early period of his life. Mr. Wellesley has undertaken to shew that the deceased was, at the date of the paper, of sound mind, memory, and understanding, but he has not done so. According to Swinburne,* the Court will not pronounce for a paper on evidence of handwriting alone: it must be joined to circumstances probable and natural: nor is this in cases of disputed handwriting alone. *Headington v. Holloway*.†

Nothing but
proof of hand-
writing.

Not otherwise
connected with
deceased.

History of
deceased in for-
mer case.

Failure of
proof of sanity.

Proof of hand-
writing must be
coupled with
probable cir-
cumstances.

* P. iv. § 25, 8?

† 3 Hagg. E. R. 280.

DEC. 16.

*Wellesley v.
Vere.*An inofficious
will.

Harding, D., on the same side.—In this case, of all others the *onus* of proof is upon the party propounding the instrument, the more so as the document is inofficious on the face of it: there is no evidence that the deceased ever saw the person appointed universal legatee. The Court has the fact before it that there was a subsequent will of the same deceased, which was set aside on the ground of insanity; this appears from the affidavit of Mr. Wellesley as to scripta. The question resolves itself into this: whether, where there is no dispute as to the handwriting, and the document does not in itself sound to folly, the Court can pronounce for it. Mere proof of handwriting is not sufficient. *Bussell v. Marriott*,^{*} *Ridson v. Locke*.†

Burnaby, D., *contra*, was stopped by the Court.

JUDGMENT.

Paper not in-
complete,or imperfect,
though infor-
mal.Alleged un-
soundness on
face of paper.

SIR H. JENNER.—This is a question respecting the validity of a paper admitted to be in the handwriting of the deceased; it is not signed at the foot or end, undoubtedly but it is not a necessary inference that the paper is on that account incomplete; so far as the testator intended, it is complete, for there is no suggestion that he had ever meant to sign it at the foot. I am not, at all events, prepared to accede to the doctrine that this must be considered an imperfect or incomplete paper; it may be an informal paper but it does not follow that it is imperfect, or not entitled to probate, there being nothing to shew that the deceased intended to do any thing further to the paper to give it operation, and I am of opinion that, if it had been produced before the Court shortly after the death of the deceased, should have considered that he had intended it should operate, and that the Court would be bound to give it effect, and it does not follow, because it is dated in 1822, unless any thing has occurred to the contrary since, that it should not be considered as a complete and effective will. It is said that the paper bears on the face of it marks of unsoundness of mind, or at least, that it contains certain expressions,—such as “every thing I possess under the sun,”—from which the Court cannot conclude that this gentleman should be considered to have been in the possession of sound

* 1 Curt. 18.

† 2 Add. 53.

mind, memory, and understanding. But would such expressions, independent of any circumstances, compel the Court to hold that he was of unsound mind? "To Henry Wellesley, a younger son of the Marquess Wellesley, who is brother to the Duke of Wellington." It is said that it is extraordinary that the deceased should have thought it necessary to identify the Marquess of Wellesley as a brother of the Duke of Wellington, as if, in 1822, the Marquess of Wellesley was not a sufficiently conspicuous character; and there is a peculiarity in this, undoubtedly. But I am to consider this case independent of the circumstances adverted to in the argument; I am to consider this as a paper written in 1822 by a gentleman who may have been eccentric and peculiar in his notions; but, on the face of the paper, I cannot take upon myself to say that there is enough to satisfy me that he was not of sound mind, memory, and understanding, at the time it bears date, and that he ever intended to do more to the paper in order to give it effect and operation.

The paper is opposed by Mr. Hope Vere, as the brother and a next of kin of the deceased, and Mrs. Knox, the deceased's sister, has been made a party by a decree against her to see proceedings; it is propounded by Mr. Wellesley (whoever he may happen to be, whether known to the deceased or not), as universal legatee, in a *condidit*, and he undertakes to satisfy the Court that the paper was written by the deceased, and that he was of perfectly sound mind, memory, and understanding; and if he does so, and the paper does not shew any want of completeness, so far as the deceased intended to complete it, it will be entitled to probate.

Now it is said that the Court cannot be satisfied by the evidence of two persons as to handwriting, and that there are cases in which this Court has laid it down that it cannot pronounce for a paper merely on evidence of handwriting, unless there are some circumstances of probability. I am not aware that this Court has laid this down in any case entirely bereft of circumstances of suspicion. In cases of disputed handwriting, the Court has said, "I will not pronounce in favour of the paper on such evidence merely,

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Wellesley v. Vere.

Effect of expressions independent of circumstances.

Testator may have been eccentric and peculiar;
not unsound.

Parties in the cause.

Proof of paper.

Evidence of probability not necessary where an entire absence of suspicion.

Dec. 16. without some adminicular proof." In *Headington v. Holloway*, there were circumstances which did cast a suspicion on the case, arising from the conduct of the party; and in *Bussell v. Marriott*, and in *Robson v. Roche*, the Court laid down the doctrine, with reference to the circumstances of those particular cases, that, even if there was evidence of handwriting, that would not be sufficient without admini-

No suspicion
in this case.

cular proof. In this case, I have no doubt as to the identity of the party, or as to the handwriting, which is, indeed, admitted; and if it were ever so informal a document, even if there was no name to it, the result would be the same; for if once the Court is satisfied that it is the act of the person whose act it purports to be, and is in as complete a state as the deceased meant it to be in, I must hold it to be the will of that person, and, unless there is something to shake the general presumption, I am not at liberty to presume that the deceased was of unsound mind, with reference to the disposition itself, or to some of the expressions used in the paper.

Will inoffi-
cious.

It is also said, that the will is inofficious, and that the Court must be satisfied that the *onus probandi* is discharged by the party setting it up; and it is, undoubtedly, an inofficious will, giving away the property from the brother and sister, to a person who appears to be a stranger in blood. But I am called upon to go further, and to presume that he is not only a stranger in blood, and not an intimate friend, but I must presume that he was a perfect stranger to the deceased. But surely, I may presume that there is such a person as that named in the will, "Henry Wellealey, a younger son of the Marquess of Wellealey;" unless there is something to raise a doubt in my mind, I must presume that there is such a person, and I do not see that any doubt is expressed upon this point.

Then we come to the question, What is sufficient proof of handwriting capacity? This paper is admitted to be all in the handwriting of the testator, and was intended by him to operate as a will. I must presume, till the contrary is shewn, that he was of perfectly sound mind, memory, and understanding. If I am satisfied that it is Mr. Edward Hope's handwriting, and that he intended it to operate as his will, unless

Handwriting
admitted.
Intention that
paper should
have effect.

there is evidence to the contrary on the face of the paper, or unless the contrary be shewn by extrinsic evidence, I must presume that he was of sound mind ; for it is the presumption of law that every man is of sound mind till the contrary is shewn. I am of opinion that, on the face of the paper, the testator meant to do nothing more to it to make it operative, and that there is nothing on the face of the paper to shew that he was not of sound mind, but, on the contrary, it shews that he was of sound mind.

A letter has been referred to as having been produced in the former case, and an interrogatory has been put to the witnesses in the present case with reference to this letter, and certainly it is a document which shews that the mind of this gentleman was not in a very firm state at the time, if I may so express myself ; the letter itself is most extraordinary, and, coupled with other facts, might be sufficient to induce the Court to conclude that he was of unsound mind. But there is nothing besides it to shew that he was, in fact, of unsound mind. The letter refers to some disease under which he supposed himself to be labouring, and complains of his sister's conduct with respect to it, and, coupled with other circumstances, and with the subsequent state of the deceased, this letter might have satisfied the Court that he was not of sound mind in 1822. But I have nothing before me except this letter, and I cannot consider that alone sufficient to shew that he was not of sound mind. It was quite competent to the other party to have pleaded other circumstances ; but if the party will not do so, the Court cannot do it for him. He must judge for himself, and if this paper is proved to be in the handwriting of the deceased, and he had no intention to do more to it in order to give it effect, that is sufficient, without shewing that it came out of the custody of the deceased, or that he still considered it as his will at the time of his death : what was his will continued to be his will, till it was revoked.

Then can the Court refer to the evidence in the other cause? I am of opinion that it cannot, under the circumstances of the case, allow that evidence to be introduced. The point was decided long ago, when the cause was con-

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*Wellesley v.
Vere.*

General presumption of law in favour of soundness.

Nothing on face of paper to shew unsoundness, but the contrary.
The letter.

Shews mind of deceased not very firm.

Coupled with other facts, it might have proved unsoundness.

But nothing else.

Evidence in the other cause cannot be used.

Dnc. 16. *Wellesley v. Vere.* concluded, and the Proctor for Mr. Hope Vere declared he gave no exceptive Allegation, and gave in his prayer that the Court would pronounce that the other party had failed in his proof. I do not say that there may not be cases in which the proceedings in other causes may be used, and although it is said it may prevent a failure of justice, and counteract perjury and inconveniences, I cannot but think that it would be a most inconvenient mode of proceeding, to have the evidence as to the validity of a paper executed in 1835, and as to the deceased's mind at that time, referred to in order to shew his state of mind in 1822, thirteen years before. It is true, the history of the deceased was investigated from an early period; but it does not follow that, because the Court was of opinion that he was insane in 1835, there was evidence sufficient to satisfy its mind as to his state in 1822, and if I were to suppose there is, I should have to go into

Inconvenience of using such evidence.

Party should have pleaded unsoundness of mind.

the case again, and have it re-argued. If the party was of opinion that he was able to shew the unsoundness of the deceased's mind at the time he wrote this paper, he should have pleaded it, and should have given some intimation of his intention to import the evidence of the former case into the present. But he suffered the cause to be concluded without any notice to the other side. If the party did not think proper to plead, or to have recourse to the usual mode of proceeding, it is a misfortune with which the Court is not chargeable.

I am of opinion that it is proved satisfactorily to my mind that this is the will of Mr. Edward Hope; that he meant to do nothing more to it, in order to render it complete, and there is nothing to convince me that he was of unsound mind. I am bound to decree administration with the paper annexed to the Rev. Henry Wellesley, as universal legatee.

Administration decreed to legatee.

Inventory and Account.—An administratrix not compelled to exhibit an I. and A., on the ground of

SCURRAH v. SCURRAH.—*Act on Petition.*—This was a petition in opposition to a prayer to the Court to assign an administratrix to exhibit an Inventory and Account of the goods, chattels, and credits of Richard Edward Scurrah, her son, who died 6th August, 1823, a bachelor, intestate, leaving

his mother, Sarah S., widow, his next of kin; Ann S., spinster (afterwards married to E. G., deceased), Ralph William S., and Sarah S., his brother and sisters. In the same month of August, 1823, the mother took out Letters of Administration of the goods of the deceased under £300. No application had been made to the Court for an Inventory and Account till August, 1841, when the administratrix was cited for that purpose by R. W. S., her son. In her Petition, she stated that the affairs of the deceased were much involved; that his debts exceeded the assets; that, being in service and unacquainted with business, her son, R. W. S., the other party, who was well acquainted with the embarrassed state of the deceased's affairs, assisted her in the management thereof, for which she remunerated him out of her own money; that the house in which the deceased had lived was held by him on a lease, at a rental of £60 a year, which rent, as well as the taxes, was paid, and the covenants of the lease were kept up, by her till 1825, when the lease and fixtures were sold for £100; that, subsequent thereto, R. W. S. made out an account (annexed) of all that had been received and paid relative to the deceased's estate, whereby it appeared that S. S. had disbursed £41 more than she had received; that by reason of the premises, and of her advanced age (79), and the long time that had elapsed since the deceased's death, and also by reason that, R. W. S. having had the chief management of the deceased's affairs, and kept possession of some of the books and papers (unless they are lost or mislaid), she is utterly unable, and ought not to be required, to make out an Inventory and Account. In his reply to the Act, the other party denied that the deceased's affairs were much involved at his death, or that his debts exceeded the assets, or that he assisted S. S. in the management of the affairs, save and except that he made out, at her request, bills due to the deceased for work and materials supplied by him in his business of painter and glazier, which he was enabled to do by the bill-book of the deceased, of which he took possession at his death, with the consent of S. S., and which he used for the purpose of making out his own bills, and save and except that he had received a few bills to the amount of

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—
Scurrah v.
Scurrah.

the other party's passiveness for 18 years, and other circumstances. — The Court has a discretion, though lapse of time is no bar. — Party taking out decree condemned in costs.

Dxc. 16. £11. 10s., and £100 for the lease and fixtures of the house, which he had paid to his mother.
Scurrah v. Scurrah. Haggard, D., for the administratrix.—In *Bowles v. Harvey*,* a case very analogous in its circumstances to this, a similar application was rejected with costs, as “a very vexatious proceeding.”

ARGUMENT. *Jenner, D.*, for the party taking out the decree.—Although it is true that the deceased died in 1823, and the administratrix is 79, neither age nor lapse of time has been held to be an applicant, or relieve a party from the obligation of furnishing an Inventory, unless the papers are lost, or there has been *laches* on the part of the person calling for an Inventory, or there is evidence that the estate has been fully administered. It is said that the estate is insolvent, and the effects were sworn under £300; but the assets are now stated to be £614. The case of *Bowles v. Harvey* is very different from this; there the Court said it was impossible then to make out the Inventory, as the papers were all lost. In the case of *Higgins v. Higgins*,† the deceased died in 1815, and the Court said, “After a delay of so many years a full and particular Inventory and Account cannot reasonably be expected or required, and therefore a declaration has been substituted and produced.” There was a declaration instead of an Inventory; in this case nothing is exhibited. In *Pitt v. Woodham*,‡ the Court refused to call on a widow and administratrix for an Inventory and Account at the instance of the assignee of an insolvent, after long acquiescence of the party, on a suggestion that he had not received his distributive share. We only want, if the party cannot give an Inventory and Account, that we may have some declaration instead.

JUDGMENT. SIR H. JENNER.—No application has been made for an Inventory and Account by any of the parties for eighteen years after the death of the deceased and the grant of administration; and the Court, under such circumstances, expects some grounds to be stated to justify an application made at such a late period; for, although lapse of time is no bar, yet

* 4 Hagg. 241.

† 4 Hagg. 242.

‡ 1 Hagg. 241.

opinion that the Court has a discretion—and the cases referred to shew that the Court has exercised such discretion—of considering whether, under the circumstances of the case, it ought to call on the party to exhibit an Inventory and Account, after a long lapse of time, and when the shares have been distributed. The Court by no means lays it down that a party can allege lapse of time as a bar.

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Court has a discretion.

It appears that, on the accounts made out by Mr. Ralph William Scurrah, there has been received £614, and that the mother has paid £653, leaving a balance in favour of the administratrix of £39, which has since been farther increased to £41 by the payment of a debt of £2: this is the account as made out by R. W. S. It would appear, therefore, that there were not assets for the payment of the debts; but this is not conclusive, and there may be other sums received or paid by her. Still, the Court expects, after a lapse of eighteen years, when this old lady is in her 80th year, and she swears she has lost some of the books and is unable to make out the Account, that there should be good ground laid for the exercise of its power to call for the exhibition of an Inventory and Account. The administratrix has sworn to the facts stated in her Petition, and though it is loosely expressed, I take her averment to be a positive averment that no other money or effects, to which the deceased was entitled, have come to her hands, than is set forth in her statement, and that there are no other assets. What is the answer of Mr. Ralph William Scurrah? That he is not aware that the affairs of the deceased were involved, or that the debts exceeded the assets; that, with the exception of the bill-book, he has not had any book or papers of the deceased; that he had made several applications to his mother for his share of the deceased's estate (so that he thought he was entitled to a share), and that she had refused to pay it, stating that she was entitled to the whole of the deceased's property. Notwithstanding this, he has ventured to swear that it was not till August last he knew he was entitled to a share of the estate. Now I confess that, considering he was of mature age (being 24 at the time of his brother's death), and carrying on the business of a painter and gla-

Administratrix has expended more than she has received.

Not conclusive;

but, under circumstances, ground should be laid.

Averment of the administratrix.

Answer of the other party.

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Scurrah v. Scurrah.

Grossly ignorant of his rights.

Court will not aid a party

wilfully ignorant or negligent.

No averment that he believes there are other assets.

Application refused,

with costs.

sier, that he should have been ignorant of his rights, and believed that he was not entitled to any part of the property, exceeds my belief. If it be so, it is *crassa ignorantia*, and which he must take the consequences, for he might have ascertained that he was entitled to a part of the property, and if he lies by till August, 1841, the Court will not call for an Inventory and Account at this person's advanced age when she swears she has no means of making an Account and has no other assets of the deceased. I must say that the party has been grossly ignorant of his own rights, and even wilfully ignorant, as he might have satisfied himself, and ought to have done so, and should not harass the other party, at this late period, by calling for an Inventory and Account. Besides, there is no averment on his part that he believes there are any other assets, or that the estate has not been fully administered.

I am of opinion that the Court must exercise its discretion in this as in other cases,—a discretion necessarily belonging to all Courts of Justice,—by refusing to comply with obedience to the citation (the party, very properly, has not appeared under protest), and by not compelling the administratrix to bring in an Inventory and Account. And I think the Court is bound to mark its opinion of such a case as this, by condemning the other party in the costs.

(Party cited dismissed, and the other party condemned to the costs.)

DECEMBER 23.

Will of a married woman, under a power, requiring publication.—Fact of publication, not apparent on the face of the paper, established by parol testimony.

COOPER AND THOMPSON v. DUNN.—*Case.*—This was a question as to the will of a married woman, Mrs. E. B. Seton, made by virtue of a power, under her marriage-settlement, which secured to her the disposal of a certain sum “by a will signed and published by her in the presence of two witnesses,” but not requiring attestation. She died 20th October, 1834, leaving her husband surviving, who had an interest in the property, and who died in October, 1840. Her will, which was dated 5th May, 1830, was propounded by the executors, a caveat having been entered by a niece

and one of the next of kin, who claimed to be entitled to a moiety of the property bequeathed under the settlement, if the will was invalid. The question was, whether the will (which did not purport upon the face of it to have been published by the deceased) had been executed in compliance with the power. The two attesting witnesses, in whose presence it was signed, were a father and daughter. The latter admitted that her recollection was meagre, but she remembered the deceased signing her name in the presence of her father and herself, though she did not recollect the year, nor could she call to mind any particular form used; but she said, "I am quite sure she knew it was her will, and she declared it was so, in the presence of us all, just after she signed it." The other witness deposed that he and his daughter were sent for "to see Mrs. Sutton sign her will;" that she signed it in the presence of his daughter and himself, and that they signed their names as witnesses; and he added: "I recollect that Mrs. Sutton said something about its being her last will and testament."

DEC. 23.

Cooper v. Dunn.

Haggard, D., in support of the will, submitted that the parol evidence established the fact of publication. ARGUMENT.

Curtis, D., *contra*.—The will, *prima facie*, is not a good execution of the power, as it does not purport on the face of it to be "published," and the *onus* is on the party propounding the paper to shew that it was published; the Court will require as specific a proof of this fact as of any other, and will not infer any thing in favour of the act. If the deceased was aware that publication was necessary, and intended to act under the power, she would have taken care to have had it stated that it was published.

SIR H. JENNER.—My mind is quite clear. Considering the great length of time which had elapsed before the witnesses were called upon to give their testimony,—the will being dated in 1830, and the witnesses being examined in 1841,—they cannot be expected to recollect minutely what they are called upon to depose to, namely, the purport of the declaration made by the deceased when the act took place. The power requires that the will should be executed and "published" in the presence of two witnesses; this JUDGMENT.

Dec. 23. paper is signed in the presence of two witnesses. Unless
Cooper v. Dunn. the Court is to hold that, after the lapse of so many years,
 these witnesses were to depose in a manner which would
 tend to defeat their evidence by its very strength,—by the
 great particularity and tenacity of memory it should evince.
 Considering lapse of time, —the Court is bound to accept the evidence in this case as
 Court bound to accept evidence, sufficient proof of publication in the presence of the witnesses who were called to attest the will. I am of opinion
 as sufficient proof of publication, that the evidence is sufficient to satisfy me that the will was
 not only signed by the deceased in the presence of witnesses,
 but published by her in the presence of witnesses.
Costs. The costs must be paid out of the estate. The paper
 does not purport on the face of it that there was a publication.
 Under all the circumstances, it was necessary that the
 case should be brought before the Court.

A codicil of 1838, pleaded to have been superseded by a later codicil, pronounced for, and evidence being excluded on the ground that, upon the face of the instruments, there was no ambiguity, and no presumption that the testator did not intend the instruments to operate together.

THORNE v. WORRALL, AFTERWARDS LANGDON v. ROOKE.
—Allegation.—Cause.—This was a cause of proving in solemn form a codicil to the will (with five other codicils) of Mr. George Rooke, of Bigsweat, Gloucester, by Frances Langdon (wife of Henry Langdon), heretofore Thorne, otherwise Stafford, spinster, the sole legatee named in the codicil against Hannah Rooke (heretofore Worrall), widow, relict and sole executrix of Mr. George Worrall, deceased, who was living, the surviving executor of Mr. George Rooke, the testator. The will bore date 14th May, 1827; the first codicil was dated 21st May, 1829; the second, 22nd January, 1833; the third, 26th April, 1839; the fourth, 23rd May, 1839; the fifth, 14th September, 1839. Of this will, Mr. George Worrall and Sir William Robinson (deceased) were appointed executors. The testator died 15th December, 1839, aged 36, a bachelor, possessed of considerable property, the personal effects being sworn under £25,000. The will and five codicils were proved in this Court on the 20th February, 1840, by Mr. Worrall the (then) surviving executor, who died on the 6th May, 1840. On the 30th May, 1840, a decree issued citing his widow and executrix (who had taken the name of Rooke) to take probate of a further codicil, dated 24th Sep-

tember, 1838, at the instance of Frances Thorne, otherwise Stafford (now Langdon), which she refused to do, and thereupon the codicil was propounded by the party interested, Frances Thorne: it is in the handwriting of the testator, and to the following effect:

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Rooke.

By this codicil to my will, I give and bequeath to Mrs. Frances Sophia Stafford, born Thorne, now residing at No. 18, Elm Tree Road, St. John's Wood, London, the sum of two thousand pounds, to be paid to her within three months after the date of my death. Dated this 24th September, 1838. George Rooke. The above sum of £2,000 to be paid clear of legacy duty. G. R.

The codicil
of 1838.

This codicil was duly executed and attested.

The Allegation (in the form of a *condidit*) propounding this codicil was admitted without opposition, and witnesses were examined in support of it. On the part of Mrs. Rooke, an Allegation in opposition to the codicil was brought in, which pleaded as follows:—That, in 1836, 1837, and previously, Mr. Rooke (the deceased) carried on an illicit connection with Frances Thorne, the legatee, which was continued till his death, though he was very reserved on the subject of this connection; that, in consideration of such connection, he, on the 24th September, 1838, wrote and executed the codicil in question, sealed it up and delivered it to F. T., and subsequent thereto, but previous to 26th April, 1839, he informed her of the amount he had given her thereby, and recommended her, in case of his death, to sink the sum in an annuity for her life; that, early in 1839, he was taken seriously ill, and was advised to remove from the Albany, where he lived, and he took up his residence in Elm Tree Road, with F. T., in a house rented by him for her; that this illness affected his memory; that F. T. frequently represented that the amount left her by the codicil was not sufficient, and expressed a desire that the instrument should be more formally executed; that, previous to the 26th April, 1839, acting under the reserve before mentioned, he gave instructions to an acquaintance, H. W., who was the solicitor of F. T. (not his own), to have another codicil prepared in lieu and substitution of that of 24th September, 1838, and which was executed on the 26th April, 1839;

Allegation in
opposition
thereto.

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that, on several occasions, before and after the execution of this codicil, he declared to H. W. that the provision made thereby was the sole benefit he intended F. T. to take on his death; that, believing and intending such codicil to be a revocation of all previous testamentary benefits to F. T., the testator took no further steps towards destroying the codicil of 24th September, 1838, which was not, and never afterwards was, within his control; that Mrs. Worrall, who was the testator's aunt, hearing of his illness, went to stay with him, and remained several months to nurse him, being accompanied by her husband, his executor, and after his death, the three later codicils were brought to Mr. Worrall by H. W., but no reference was made by him or F. T. to the codicil of 24th September, 1838, and both declared that the papers so delivered up were the only papers F. T. possessed belonging to the deceased; that both knew that probate of the will and codicils was about to be applied for by the executor; that it being necessary, in administering the real estate, to file a bill in Chancery, F. T. filed her bill for payment of legacies under the codicil of 26th April, 1839, but did not therein refer to the codicil of 24th September, 1838, the existence of which was first made known in March 1840; that F. T., after April, 1839, declared to one of the witnesses to the codicil of 24th September, 1838, to whom she had complained of the inadequacy of the provision, that every thing was now settled by annuity, and that the codicil she had witnessed was of no use; and that F. T. declared to another person, that the codicil of 26th April, 1839, though in her possession, was not considered by the testator as subsisting and operative, and that one codicil had been substituted for the other.

Codicil of
26th April,
1839.

The codicil of 26th April, 1839, bequeaths to R. F. and H. W. £18,488. 6s. 8d. Three per cent. Consols, upon trust to pay the interest to Frances Thorne, passing by the name of Mrs. Stafford, "during so long as she shall live, and shall not sell, mortgage, or otherwise charge or dispose thereof by anticipation, or become bankrupt or insolvent, or do any act whereby the same, if limited to her for her life, would become payable to any other person;" declaring that the mar-

riage of F. T. shall not be a determination of the trust for her benefit; provided that, previously to such marriage, she shall settle her estate and interest under the trust for her separate use: and it gives to F. T. a legacy of £100, to be paid within a month after his decease, free of legacy duty. §

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Addams, D., for the legatee.—The question must be governed by the Will Act, 1 Vict. c. 26, § 20, according to

Jan. 20, 1841.
ARGUMENT.

which, no will or codicil can be revoked but by marriage, or by another will or codicil, or by some writing duly executed, declaring an intention to revoke, or by destruction. The present codicil is not revoked by either of these modes. Independent of the statute, in a Court of Probate, the intention of the deceased, as to what instrument shall operate as his will, is to be collected from all the circumstances of the case taken together. *Greenough v. Martin*.* This being a regularly executed instrument, in the handwriting of the testator, executed in strict conformity with the statute, and not expressly revoked, it is entitled to probate, unless it can be established to perfect demonstration, so as to leave no possible doubt, that it was the intention of the testator that it should not operate. In *Smith and Blake v. Cunningham*,† it was held that a regularly executed will can hardly be deemed to be revoked by mere inference or implication, under any circumstances. The present Act excludes parol evidence. The object of this Allegation is to set up that all the circumstances taken together shew that it was contrary to the testator's intention that this paper should operate; but it is an uncandid Allegation, not setting forth all the circumstances fairly.

Codicil not
revoked in any
mode prescribed
by the Act.Entitled to
probate unless
proved to de-
monstration
that not intend-
ed to operate.

Waddilove, D., on the same side.

Sir John Dodson, Q. A., contra.—By the present law, a will or codicil may be revoked *expressly*, by another will or codicil; or *virtually*, “by some writing declaring an intention to revoke the same.” In respect to virtual revocation, it leaves the law as before. Previous to the late statute, parol evidence might be received, and I find nothing in the statute which excludes parol evidence to shew whether or not it was the intention of the testator to revoke. It is only

An instru-
ment may be re-
voked *virtually*.In respect to
virtual revoca-
tion, parol evi-
dence admissi-
ble.

* 2 Add. 239.

† 1 Add. 448.

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in the construction of a written instrument that we must look to the instrument alone, without extrinsic evidence. "In a Court of Construction, the inquiry is pretty closely limited to the contents of the instrument itself, in order to ascertain the intentions of the testator; but in the Court of Probate, the inquiry is not so limited." *Greenough v. Martin*. This makes it more important that the Court of Probate should be cautious that no paper goes before a Court of Construction that does not contain the real intentions of the deceased, which are "to be collected from the circumstances of the case." In *Methuen v. Methuen*,^{*} it was held that a codicil was virtually revoked by another codicil of a subsequent date, though there were no express words of revocation, both being regularly executed and attested, and prepared by the same solicitor, who proved that the testator meant that the latter only should operate.

Only question if the facts pleaded shew intention of testator.

Clear that the codicil must be a substitution.

The only question is, whether the facts and circumstances stated in this Allegation are sufficient to shew the real intentions of the deceased as to the operation of this paper. It is clear that the bequest it contains could not be meant to be cumulative; it must be a substitution.

Nicholl, D., on the same side, cited (in addition) *Campbell v. Lord Radnor*;† *Osborne v. Duke of Leeds*;‡ *Hurd v. Beach*;§ *Calder v. Calder*.||

Cur. adv. vult.

PER CURIAM.—As this is an important question of law with regard to the admission of parol evidence, the Court must take time to consider it. This is the first case which has occurred since the statute.

July 8.
JUDGMENT.

SIR H. JENNER.—The Court postponed its decision in this case till the judgment of the Judicial Committee of the Privy Council had been delivered in the case of *Brooke v. Kent*,¶ as to the admissibility of an Allegation rejected by this Court, which (though the circumstances of the case are not quite similar) the Court thought might afford some light as to the construction to be put upon several clauses of the statute. The Court has been favoured with a note of

* 2 Phill. 416.

§ 5 Madd. 351.

† 1 Bro. C. C. 271.

|| 2 Phill. 269, in not.

‡ 5 Ves. 368.

¶ See ante, p. 331.

that judgment, but it does not appear very materially to bear upon the question now before it.

The paper in question is regularly executed, and attested (as I at present assume) in conformity with the Act; it remains uncanceled, and perfect; it is not denied to be in the handwriting of the deceased, and to have been executed by him at a time when he was of perfect capacity, nor is it suggested that any fraud was practised upon him; therefore, it is entitled to probate unless it is revoked by some paper of subsequent date. The object of the Allegation is to shew that, as the paper of 26th April, 1839, purports to give this lady a larger portion of the property than it was intended she should have by the paper of 24th September, 1838, the later codicil was intended to revoke the other. Now, the two papers remaining uncanceled at the time of the testator's death, it lies with the party setting up the revocation, or rather the substitution of one for the other, to shew the grounds upon which the Court is to come to that conclusion; for, the two papers remaining in their original state, *prima facie*, both are entitled to probate, unless it can be shewn by necessary implication, or in some other way, that the second paper is a revocation of the first.

Before I notice the contents of the Allegation, it may be necessary to consider the principles on which this Court proceeds with respect to papers of this kind, which, having relation to a previous paper, are not in themselves revocatory of such former paper, and how far it is within the power of the Court to admit parol evidence as to the contents of a paper duly executed, and which must be presumed to contain the final intentions of the deceased.

I apprehend that, in the first place, the Court looks to the paper itself, to discover if there be any ambiguity as to the *factum* of the will, or as to any insertion or omission therein; and if it finds in the paper itself any real doubt or ambiguity, or any thing tending to shew that it was not the intention of the deceased that the two papers should both operate—if there be any such ambiguity, the Court may admit parol evidence to remove the difficulty which appears on the face of the paper itself. But it is a rule and prin-

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Paper in question regularly executed, and uncanceled;

and entitled to probate unless revoked.

It lies on the party setting up revocation to prove it.

Principles on which the Court proceeds in such cases, as to admission of parol evidence.

It first looks if there be any ambiguity as to the *factum* on the paper itself;

if there be, it admits parol evidence to remove it.

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This Court
not otherwise
at liberty to
look beyond
paper itself.

Cases.

Rule cannot
be ascertained
from one or two
cases.

Fawcett v. Jones.

Per Sir J.
Nicholl.

ciple of this Court not so to interfere unless there be some doubt or ambiguity as to the *factum*, or as to some insertion or omission, or as to the intention that the one paper should be a revocation of or substitution for the other. I apprehend that the rule applies as well to this Court as to a Court of Construction, and that this Court is not at liberty to look beyond the instrument itself, to ascertain the meaning of the testator, unless there be on the face of the paper some doubt, difficulty, or ambiguity, as to the contents.

I find this rule laid down in a variety of cases, of which two or three were mentioned in the argument,—*Melhuish v. Melhuish*, *Greenough v. Martin*, *Smith and Blake v. Cunningham*, and a case at Common Law was also cited, *Campbell v. Lord Radnor*, in which the power of the Ecclesiastical Court to admit parol evidence in such cases was stated by Lord Loughborough, in 1783. But I will, in the first instance, look at the principles laid down in the decisions in this Court, as furnishing the rule by which, in the first instance, the cases arising within the province of Canterbury must be governed. I may observe, that it is not by referring to one or two cases that the rule and practice of the Court can be ascertained, because they may depend upon the particular circumstances of those cases; the rule and practice must be ascertained by an examination of various cases, where the principle is similar, though the circumstances may be different.

The first case is that of *Fawcett v. Jones*,* which occurred in 1810. It is not a case in its circumstances precisely similar to the present, because that was a case in which the Court was prayed to pronounce for instructions as part of a will of which probate had been taken. But the principle which the Court laid down with respect to the admission of parol evidence is stated in a forcible manner by the learned Judge :—"I apprehend it is a general leading principle, that when an instrument has been executed by a competent person, you must presume that the person so executing it knew the contents and the effect of the instrument, and that he intended to give that effect to it. In order to decide, in ge-

* 3 Phill. 434.

neral cases, what is the effect and construction of an instrument, you can only look to the contents of the instrument itself. If the contents be doubtful, you may receive extrinsic evidence for the purpose of explaining and construing an instrument; but if a will speaks clear of all doubt, no parol evidence can be admitted to construe it. The Courts have only deviated from those principles where some ambiguity arises upon the executed instrument. There exists no very material distinction in principle between the Court of Probate and Courts of Construction, so far as respects the present point." And the learned Judge refers to other cases in which, there being no ambiguity on the face of the instrument, parol evidence was rejected. In *Matthews v. Warner*,* this Court, in the first instance, refused to admit extrinsic evidence, on the ground that there was no ambiguity, and its judgment was confirmed by the Court of Delegates; but the Court of Review, being of opinion that it was a case in which there was an ambiguity—namely, whether the instrument had been executed as a will, or merely authenticated as instructions, from which a will should be prepared—did admit extrinsic evidence, and the decision of the Courts below was reversed. But the principle is not impugned by that decision, for the paper in that case, though apparently complete, was described and endorsed as "plan of a will," and was written on office paper, ruled over with red lines; therefore there was sufficient ambiguity raised on the face of the paper to justify the admission of parol and extrinsic evidence, and such evidence was admitted on the express ground that there was an ambiguity on the face of the paper.

In *Lord Cholmondeley v. Lord Walpole*,† the codicil expressly referred to a will by date, and a doubt was suggested, to which of two wills the testator meant to refer; but the Court of King's Bench rejected parol evidence, holding that there was no ambiguity. In *Lord St. Helens v. the Marchioness of Exeter*,‡ the codicil in question referred to a will not existing; therefore there was an ambiguity, and parol evidence was justly let in to shew which will the testator meant.

Sir John Nicholl, after referring to these cases, says:—"I must here observe that, in the Court of Probate, there must

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*Langdon v. Rooks.**Matthews v. Warner.**L. Cholmondeley v. L. Walpole.**L. St. Helens v. March. Exeter.*

* 4 Ves. jun. 186.

† 7 T. R. 740.

‡ 3 Phill. 461.

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be some ambiguity, not upon the construction, but upon the *factum* of the instrument—not whether a particular clause will have a particular effect, but whether the deceased meant that particular clause to be part of the instrument,” as in *Barton v. Robins* ;* “whether the codicil was meant to republish a former or a subsequent will ; whether the residuary clause was fraudulently introduced without the knowledge of the testator ; whether the residuary clause was accidentally omitted, as in *Janssen v. Damer*,” otherwise *Blackwood v. Damer* ;† “whether an instrument be subscribed in order to authenticate it as memoranda for a future will, or to execute it as a final will, as in *Matthens v. Warner* : these are all questions of ambiguity upon the *factum* of the instrument.” He then refers very circumstantially to the case of *Janssen v. Damer*, and also to other cases to which the same principle was applied. And in a later case, *Draper v. Hitch*,‡ where the Court thought it right to admit parol testimony, it acted upon the same principle. That was the will of a married woman, who went with her husband to the office of a conveyancer, and gave a clerk instructions for a will revoking all former wills. The clerk, observing that she was a married woman, said she could not make a will, but the husband saying, “You have a power to do so,” he added, “You must give it to me.” The husband afterwards left with the clerk a copy of the will and codicils giving the power, from which the will in question was drawn up. The Court thought that, under all the circumstances, there was sufficient ground to admit the Allegation to proof ; but when the evidence was published, the learned Judge was of opinion that there was no ambiguity on the face of the paper to authorize it to set aside the revocatory clause, and decreed administration, with the latter will annexed, to be delivered out, without pronouncing against the former will.

*Harrison v.
Stone.*

In the case of *Harrison v. Stone*,§ the Court laid down the same principle—that there must be “some ambiguity on the face of the executed instrument,” and that there must be “the means of obtaining clear and indisputable proof that

* 3 Phill. 455.

† *Ibid.* 458.

‡ 1 Hagg. E. R. 674.

§ 2 Hagg. E. R. 537.

the insertion or omission of the clause was contrary to the intention of the testator ;" that " these two things must concur before the Court can safely interpose."

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It is true, none of these cases refer to the circumstance of two codicils making a provision for the same person, in which one was supposed to be a substitution for the other, and the second to revoke the first. But two of the cases mentioned in the argument bear directly on the point, and lead to the same conclusion: these two cases are *Methuen v. Methuen*, and *Greenough v. Martin*.

Methuen v. Methuen was decided in 1817. The marginal note is as follows: " A codicil virtually revoked by another codicil of a subsequent date, there being no express words of revocation in the latter instrument:" and it supports the position, that a codicil may be revoked virtually, by something being done, without express words of revocation. In that case, there was a will and three codicils; the question related to one of the codicils. The circumstances of the case are very peculiar. Sir John Nicholl said: " The question is, whether the codicil of 1815 is to be considered as an addition to the codicil of 1813, or as a substitute for and consequently revocatory of it. The first instrument remains uncanceled, and there are no revocatory words in the second. It is contended that the Court has no power to inquire any further; but the same rules do not apply in a case relating to the *factum* of a will, which would apply if the inquiry was concerning the construction of it." That observation applies to the peculiar circumstances of that case; for we do in the Court of Probate look to the contents of the instrument, as in a Court of Construction, and it was not intended to lay it down that the principles on which we act are different from those of a Court of Construction, but that we are not so strict in applying them. " In the Court of Probate, the whole question is one of intention; the *animus testandi* and the *animus revocandi* are completely open to investigation in this Court. Suppose in a case of fraud, or in a case of error, the residuary clause is omitted, it may be inserted by the Court." That was the doctrine of these Courts at that time: " It is admitted that, if there is

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Methuen.

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any doubt on the face of the instrument, the Court may admit parol evidence. On the face of the papers, it rather appears as if the testator intended one for the other; it certainly is not absolutely impossible that the deceased might have intended to increase the portions of his daughters and the annuity of his wife; but circumstances render it highly improbable that he should so have intended: there is a strong probability that he intended it as a substitute, and not as an independent codicil. Evidence, however, being admissible, there can be no doubt whatever." And the Court held that the codicil was revoked; for though there were no words expressly revocatory, yet there were strong grounds of probability that it was not the intention of the deceased that both papers should operate together.

*Greenough v.
Martin.*

The other case, that of *Greenough v. Martin*, occurred in 1824. The testatrix, a very old woman, who had been blind for several years, lived with her nephew; they kept house together. She had in her service two persons, one a butler, and the other a female personal attendant, who had married the butler. Notwithstanding her defect of sight, she with her own hand wrote several codicils to her will. By the will, which was dated in March, 1821, she gave to H. M., her butler, £300; to E. M., his wife, £300, and also to the latter an annuity for life of £50, and £15 each for mourning. In May, 1821, she, by a codicil written with her own hand, gave these two persons £200 each "over what she had left them by her will." In January, 1822, she made a second codicil, whereby she gave them £400 each, "over what she had left them by her will." By a third codicil, dated in September, 1822, she gave E. M. the wife, some silver salt-spoons; and by a fourth codicil, dated in December, 1822, she gave to H. M. and E. M. £500 each, without any mention of her will. In December, 1823, she made and executed another codicil, whereby she revoked the several legacies given to her servants, except those to H. M. and his wife; and she proceeded: "The legacies of £300 and £300, which I have by my will given to H. M. and E. M. his wife, I hereby increase to £1,000 sterling each; the said legacy of £1,000 to E. M. to be in addi-

tion to the life annuity of £50 provided for her by my will," The following clause is added: "My said will having been this day read over to me, I hereby confirm the same, excepting as to any legacy that may have lapsed by reason of the death of any legatee or legatees." The intermediate codicils were propounded by the legatees (H. M. and his wife), and opposed by the executor. These papers, it appears, she had deposited with her bankers, and in December, 1823, she sent for her solicitor, desiring him to bring her will with him, as she wished to make a new one, and he took her instructions for the alterations to be made by her new will; but, finding them to be few, he suggested that they might be made by codicil, which she assented to; and accordingly executed the last-mentioned codicil, which referred to the will, but not to the previous codicils, and the Court held that the deceased did not intend that they should form part of her will, and pronounced against them. The evidence in this case could be very trifling indeed; that of the solicitor who took the instructions for the new will, and who suggested a codicil instead; and as the deceased executed the codicil, confirming the will, without mentioning the previous codicils, that was quite sufficient of itself; there was no ambiguity to justify the admission of parol evidence; parol evidence was unnecessary, and the Court was of opinion that the intermediate codicils were revoked.

I am not aware of any later decision in this Court in which the same principle has been laid down; but these cases appear to go no further than this: that if there be any doubt upon the face of the instrument itself, that is, as to the *factum* of the instrument, the Court has a right to satisfy itself, by parol evidence, of the will and intention of the testator, as to the operation of the instrument or instruments—whether one or the other, or whether both, should operate as part of his testamentary disposition.

In Courts of Equity, cases have arisen, not precisely of a similar kind, but analogous, where legacies have been sued for under wills established in this Court, the question being whether they were cumulative or substituted. There are several of these cases; amongst others cited in the

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Result of cases, must be doubt, as to *factum*, on face of the instrument.

Analogous questions in Courts of Equity.

- DEC. 23. argument, that of *Campbell v. Lord Radnor*, in the year 1783, was referred to, in order to shew that the Ecclesiastical Courts admitted parol evidence for the purpose of explaining whether a legacy was cumulative or substituted for another. In that case, the testatrix, by her will in 1761, gave to M. C. a legacy of £10, and legacies to M. W. and B. S. By a codicil in 1768, she gave M. C. £40 instead of £10; to M. W. £100, and B. S. £200. By a second codicil, in 1777, she gave M. C. £40 instead of £10; to the will, M. W. £100, as in the former codicil, and B. S. £300. The prayer of the bill was to establish the will, and that the second codicil might be declared to have revoked the first; and the counsel for the executor offered to read the evidence of Mr. Jackson, the attorney who prepared the second codicil; the object being to shew that the testatrix considered, at the time she executed that codicil, that the first was destroyed. This was opposed by the legatees, and
- Per Lord Loughborough.* Lord Loughborough said: "If reading the evidence of Mr. Jackson is opposed here, I think you had better go upon it to the Ecclesiastical Court, for a repeal of the probate of the codicil; that evidence would have been a ground to exclude the codicil from probate." And, undoubtedly, if that evidence had been received in the Ecclesiastical Court, it would have been against the probate, and would have gone to shew that it was not the intention of the testatrix that both codicils should operate. But Lord Loughborough does not expressly say that the evidence would be receivable, and I do not see that it could have been received, as there is not the ambiguity upon the face of the paper which would justify the admission of parol evidence. The result in that case, however, was, that the Lords Commissioners decided that the second codicil was a substitution for the first.*
- Guy v. Sharp.* It is true that, in the case of *Guy v. Sharp*,† which came by appeal from the Vice-Chancellor before Lord Brougham, the lordship rejected the declarations of the testator, but was in-

* "And, therefore, that the parties were entitled to the legacies given by the *first* codicil only," the report says; but the word "*first*" should be "*latter*."

† 1 Myl. & K. 589.

clined to admit, and did admit, the rest of the depositions, relating to the amount of the property and the circumstances of the family, to be read *de bene esse*, in order to place himself, as he said, as far as he could, in the same situation with the party who made the instrument, and thereby be the better able to understand his meaning in the construction of the instrument, "not to alter or control the sense—a purpose for which extrinsic evidence can never be received."

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Hurst v. Beach was a case of a party claiming to be entitled to two legacies, one given by the will and another by a codicil, and the question was, whether the legacy in the codicil was accumulative or substitutional. By the will, the testatrix said: "I give and bequeath to J. B., now living with me, the sum of £300." By the codicil, after giving several legacies of £500, she gave "to my man-servant, J. B., a like legacy or sum of £500." In that case, there seems to have been a question whether parol evidence was admissible. Sir John Leach's opinion was strong against the admissibility of such evidence; but he inquired the rule of these Courts in such cases, and directed a case to be prepared for the opinion of two civilians, and the opinion of Dr. Swabey and Dr. Lushington was taken whether there had been any decision here as to the admissibility of parol evidence in such cases; what is the course of practice here; and whether, in questions as to the admissibility of evidence to explain a testator's intention as to whether legacies given by a will and codicil should be accumulative or substitutional, this Court is governed by the civil law. The two learned counsel stated, that they were not aware that the point had ever received any decision in these Courts, or even been the subject of discussion; and they were of opinion that, in all questions upon the admissibility of evidence to explain whether a testator intended legacies given by will and codicil to be accumulative or not, the Ecclesiastical Courts should conform to the rules of Courts of Equity; but that, in doubtful points, where the admissibility of peculiar species of evidence had either not been discussed, or had been left undecided by the Courts of Equity, the rules of the civil law should govern; that the nice distinctions upon the

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admission of parol evidence to explain written instruments were not adopted in the civil law, and that, if such a case should arise in the Ecclesiastical Court, the course pursued would be to inquire whether the Courts of Equity had any decided rule on the point; if not, then, as the civil law has neither directly nor indirectly excluded that evidence, the Ecclesiastical Courts would admit the declarations of the testator as to his intention. Sir John Leach held that, there being no decided case, and no rule of practice, in this respect, in the Ecclesiastical Courts, which he would be bound to follow, as the Court of Chancery (that Court having the original jurisdiction) adopts, in questions of legacy, the rules and principles of these Courts, to which the decision of such cases properly belongs, parol evidence could not be received and he rejected it in that case. In some cases, he says, parol evidence may be admitted, to repel a presumption, raised by two instruments, that where a legacy is given by both, *ut simpliciter*, to the same person, but the same sum is given in both, and the same motive expressed, the testator did not mean a second gift. But, he says, "the presumption cannot be raised in this case, although it be admitted that the motives are the same, inasmuch as the sums are different, as upon the face of these instruments the defendant is entitled to both sums." He adds: "Upon the question whether evidence is admissible to prove that the testatrix did not mean that the defendant should take both sums, there are no decisions in Courts of Equity. There are *obiter dicta* for the admission of such testimony; but in the *Duke of Leeds v. Osborne*, the point was fully argued, and Lord Alvanley appears to have inclined against receiving it." And he refers to another case,* in which Lord Thurlow considered parol testimony admissible. Sir John Leach, however, was of opinion that such evidence could not be received in that case, without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument.

Result of the
 cases;

Looking, then, at these cases, in which the questions are analogous to those which arise in this Court, I think, accord-

* *Coote v. Boyd*, 3 Bro. C. C. 521.

ing to these decisions, I am bound not to admit parol evidence in this case, unless there be some ambiguity or doubt upon the face of the paper, which requires the aid of such evidence to explain.

Now the codicil in question, dated 24th September, 1838, purports to bequeath £2,000 to Frances Sophia Stafford (born Thorne), to be paid within three months after the testator's death; it was sealed up and remained in her possession at his death. The object of the codicil dated 26th April, 1839, is to make a provision of a different kind, namely, by way of annuity, giving her the interest of £13,433. 6s. 8d. Consols, for life, on condition that she shall not sell, dispose of, or anticipate it, or become bankrupt or insolvent; with a further legacy of £100. Looking at the face of this instrument, there are no words from which the Court can infer that it was a substitution for the former, for the different objects of the two papers do not raise a presumption against an intention that they should operate together. The first contains a bequest of a sum of money, without condition; in the other, there is a condition expressed; it is not the same sum, nor is it a legacy *ejusdem generis*; that is, instead of a specific sum, it is an annuity given and secured to her, with a provision that she should not dispose of it during her life. It is quite impossible to say that the two papers, on the face of them, present an ambiguity, or raise a doubt whether the deceased intended to make such addition to her legacy as is contained in the second codicil. The first is a gift of a specific sum, which she might get rid of, and therefore he might have added the interest of £13,433. 6s. 8d. Consols, for the purpose of securing to her a provision for the remainder of her life. What should prevent this from operating with the other? What presumption is there that the deceased intended it as a substitution for the other? On the face of the instruments, there is not any thing in the nature of doubt or ambiguity sufficient to justify the admission of parol evidence to shew that he did not intend them to operate together: and from the cases I have referred to, there must be an ambiguity on the face of the instrument before parol evidence can be admitted.

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against admission of parol evidence, unless there be ambiguity. Purport of the instruments.

Does not raise a presumption against intention that they should operate together.

Objects different.

Dec. 23. Then would the circumstances stated in this Allegation, supposing the Court were of opinion that it could admit parol evidence, shew that it was not the intention of the deceased that the papers should operate together? I consider that, under the old law, the facts pleaded would not have satisfied my mind that the testator intended to substitute one legacy for the other, and that I should have rejected this Allegation. The recent statute is not more favourable to the admission of parol evidence than the old law; but, under that law, there might be an implied revocation. Under the present law, there is only one implied revocation, namely, the marriage of the party, which operates a complete revocation of his or her will; all other implied revocations are taken away.

A fortiori, not under the new law.

Allegation rejected. I am of opinion that I must reject this Allegation.

Dec. 23. The cause. The cause was heard on the evidence of the two witnesses examined upon the *condidit*.

JUDGMENT. SIR H. JENNER.—I have no doubt about the execution; and the question of law, as to the subsequent paper being a revocation of the former, having been disposed of, by the Court's rejecting the allegation, on the ground that parol evidence is not admissible, I pronounce for the validity of the codicil of 1839. The party who has propounded this codicil, and performed the part of the executor, is entitled to her costs, generally speaking.

Sir J. Dodson.—The will and five codicils were proved, and this codicil being in the possession of the party, a decree was not taken out till 30th May.

SIR H. JENNER.—I should be sorry to introduce a variation of the rule, where a party has performed the duty of the executor; the expense of doing so should fall upon the estate.

High Court of Admiralty.

JANUARY 5, 1842.

THE "OCEAN QUEEN."—*Motion.*—This was an application to arrest the ship under 3 and 4 Vict. c. 65, sect. 6. The circumstances upon which the motion was founded were as follows: The vessel was the property of Messrs. Seely and Co., of Liverpool, in Nova Scotia. She arrived in the river Mississippi, for the purpose of obtaining a cargo on freight, in June last. The master (Long) left his ship in the river, and went up to the city of New Orleans, for the purpose of ascertaining if a freight could be procured, and he applied to the house of Messrs. F. De Lizardi and Co., the agents of Lloyd's at that place, for advice and assistance. It appeared that the vessel had a parcel of goods on board, taken in at Panama, which rendered her, according to the American navigation laws, liable to seizure and condemnation in an American port. De Lizardi and Co. advised the master to proceed immediately to sea again, but he declared that he was unable to do so for want of funds to pay for provisions and other necessaries to fit his vessel for proceeding to sea, and that neither he nor his owners had any credit or correspondents at New Orleans. De Lizardi and Co. advanced the necessary funds, at the usual commission; and the master drew a bill of exchange on his owners for £250 sterling, to cover the amount. The bill was to be payable in London, where De Lizardi and Co. have a house of trade. It was presented for acceptance and payment to the owners at Liverpool, in Nova Scotia, but they then refused to accept or pay the same. The ship had now arrived in London for the purpose, it was understood, of being sold for the benefit of her owners.

Motion to arrest a vessel, built and registered in Nova Scotia, for supplies, under 3 & 4 Vict. c. 65, § 6, refused.—Such a vessel is not "foreign," for the purposes of the stat., and the words "sea-going vessels" are not general.

Addams, D., for De Lizardi and Co., in support of the motion.—I am instructed to move the Court to permit proceedings to be instituted against this vessel, under the 6th sect. of 3 and 4 Vict. c. 65, which gives this Court jurisdiction to decide all claims and demands whatsoever for necessaries supplied to any foreign ship or sea-going vessel, and

ARGUMENT.

JAN. 5. to enforce payment. There was a scruple in the Registry as to issuing the warrant under the statute. It was said that the ship is not foreign, having been built and registered at New Brunswick ; but the question is, whether she is not a foreign ship for the purpose of this proceeding. The statute mentions not only "foreign ships," but "sea-going vessels," which must mean something different, for foreign ships must be sea-going vessels, *ex necessitate*. The necessities were supplied at New Orleans, it is true, but they were furnished by a house that had a branch firm established in this country. The vessel has been saved from confiscation by means of the funds, the payment of which is now resisted.

Ocean Queen.

Ship "foreign" for purposes of the stat.

"Sea-going vessels" not the same as "foreign ships."

JUDGMENT.

The construction contended for not sustainable.

DR. LUSHINGTON.—It is quite clear that, before the passing of this statute, the Court had no authority for the exercise of the jurisdiction now invoked ; and if I have the power to accede to the motion, it must be in virtue of one of the two constructions put on the 8th section. If it be true that the section gives the Court jurisdiction with respect to necessities supplied to any "sea-going vessel," then, undoubtedly, I might interfere ; but I confess I cannot bring my mind to the conviction that the Legislature ever intended to confer so extraordinary a power on this Court, the consequence of which would be, that every vessel fitted out at the port of London, belonging to British owners, might be arrested for the purpose of enforcing against it any demands on account of necessities. Looking at the decisions in other Courts on this subject, and at the great jealousy universally manifested against introducing the general maritime law for the purpose of enforcing demands on account of necessities ; seeing that in England it has been uniformly repudiated in our Courts of common law, I cannot think that, for this purpose, I should be justified in adopting such a construction.

Then the only other point which can admit of doubt is whether I am to consider this vessel, which was built at New Brunswick and does not belong to any party in England, as a foreign ship. I am unable to come to that conclusion. It is very true that, with respect to bottomry-bonds, considerable latitude of construction has been allowed, and as

essity has been looked to rather than locality; but I do not think that that applies to the construction of this statute. I regret that I cannot render assistance. I feel bound to refuse the motion.

JAN. 5.

Ocean Queen.
Motion refused.

END OF MICHAELMAS TERM, AND OF THE SITTINGS
AFTER THE TERM.

Admissions during this Term:—

AS ADVOCATES.

NOV. 2.—TRAVERS TWISS, Esq., LL.D.

———— HENRY ILTID NICHOLL, Esq., LL.D.

HILARY TERM, 1842.

Prerogative Court of Canterbury.

JANUARY 15.

Administration IN THE GOODS OF THE REV. WILLIAM SOUTHERN.
de bonis non CLERK, DEC.—*Motion*.—The deceased died 25th December, 1832, a bachelor, without parent, leaving John R. S. (and deceased sister of the testator, a surviving sister being imbecile, and the next of kin being remotely related and very numerous. deceased), Judith S., and Charlotte S., his brother and sisters, and only next of kin. By a will dated in 1792, he gave the residue of his property to his mother, Lydia S. widow, whom he appointed sole executrix. She died in his lifetime, and letters of administration (with will annexed) of his effects was granted by this Court, in 1833, to Judith S. one of the sisters and next of kin of the present deceased. She intermeddled therein, and died 29th August, 1841, leaving some part of the property unadministered and not fully disposed of. Charlotte S., the now surviving sister and only next of kin of the Rev. Wm. S., and the only person entitled to administration of his unadministered effects is an idiot, aged 72, and totally incapable of taking upon herself administration, or of renouncing her right therein and she has no father, mother, uncle, aunt, nephew, or niece, and her only next of kin, very distant relations, are very numerous (upwards of thirty), and resident in various places in England and in America. Charlotte S. was under the care of her sister, Judith S., and resided with her for many years, till the death of the latter, who left considerable real and personal estate. By her will, dated in 1838, and proved in this Court, Judith S. gave her freehold and leasehold estates, and the residue of her personal effects, to her

executors, J. C. and Z. R., in trust, to pay the rents, interest, and dividends to Ann R., wife of Z. R., during the joint lives of Ann R. and of Charlotte S., upon trust to the intent that Ann R. should apply the same for the maintenance, support, and convenience of Charlotte S. (stated in the will to be labouring under imbecility of mind) during her life, it being the intention of Judith S. that her sister should during her life have every thing to make her as comfortable as possible; and if there should be any surplus of the rents and dividends, she bequeathed it to Ann R. absolutely; and she directed that the executors should have access to her sister, and if she should not be properly provided for, and at the death of Ann R., that they should have the sole ordering thereof. The unadministered effects of the Rev. W. S. consisted of £1,680 New Three per Cents., the whole or part whereof belonged to Charlotte S., subject to the accounts of administration of Judith S.

JAN. 15.

Southmead, dec.

Addams, D., moved for letters of administration (with *MOTION.* will annexed) of the unadministered goods of the deceased, Rev. Wm. S., to J. C. and Z. R., executors of Judith S., during the imbecility of Charlotte S., on giving security.

SIR H. JENNER.—The only difficulty consists in getting *JUDGMENT.*

rid of the next of kin. As there is no party before the Court who is really entitled to the administration—and the next of kin would be entitled only as guardian of Charlotte S.—the Court, I think, is at liberty to decree administration to the executors of Judith S. It is clear that they are entitled to at least part of the property. The sister of this imbecile person has left all her property, which is very considerable, for her maintenance and support, at the discretion of her executors and trustees and the wife of one of them, who is to have the property as residuary legatee: so that every circumstance is favourable to the propriety of the grant, unless there is some legal objection. If any of the next of kin were before the Court praying for the grant, the circumstances would be different; but where all is so clearly for the benefit of the property and of this imbecile person, the Court cannot refuse to grant administration to the executors, for the benefit of that person, that is, during her lifetime. They

Circumstances
favourable to
the grant;

which is for the
benefit of the
property and of
the imbecile
sister.

JAN. 15. must exhibit an inventory, and the sureties must justify, & course.
Southmead, dec. *Addams, Proctor.*
 Motion granted.

A will signed at the end of a blank page, admitted to probate. IN THE GOODS OF WILLIAM CARVER, DEC.—*Motion*—The deceased made a will dated 19th October, 1840, and thereof appointed his wife, Judith C., and the Rev. A. D. executors. He left, besides his widow, ten children. The will was written with his own hand upon the front or open part of two sheets of paper, and the writing was brought down close to the end of the second sheet, so as not to leave room for his signature and the signatures of the attesting witnesses, and the testator, in consequence, wrote on the back of the second sheet, at the end, the words "signed and sealed this 19th day of October, 1840," and signed his name, in the presence of two witnesses, present at the same time, who subscribed their names, under the testator's signature, as witnesses to the due execution of the will, in the presence of the testator; the whole of the upper part of the page being thus left blank. The will was written upon paper containing printed instructions and a summary of the law relating to wills, directing that the will should be signed "at the foot or end."

Motion. *Addams, D.*, moved for probate of the paper. If the signature had been at the top, there would have been no difficulty; but I submit that the will is signed "at the foot or end" within the Act.

JUDGMENT. *SIR H. JENNER.*—The deceased seems to have written his will with a good deal of care, upon paper having printed instructions for the execution of wills. The will is contained in a certain number of paragraphs, numbered 1st, 2dly, 3dly, 4thly, and lastly, and the last paragraph is brought close to the bottom of the page. There being no room to sign at the bottom of the paper, or it can be scarcely said that there is room, the deceased, instead, signed his name on the next page, and according to the form, he considered it necessary to sign at the foot or bottom, as if he thought the end of the piece of paper to be the end of the will. The

question is, whether the signature is "at the foot or end" of the will. Under the circumstances, and there being no supposition that the deceased intended to do any more to the paper, I am inclined to consider this a good execution. If he had signed at the top of the page, there would have been no difficulty whatever.

Addams, Proctor.

JAN. 15.

Carver, dec.
Under the circumstances, a good execution.

High Court of Admiralty.

JANUARY 22.

THE "VERNON."—*Act on Petition.*—This was an action Collision.—by the owners of the *Alsen*, a Norwegian barque of 200 tons, against the *Vernon*, an East-Indiaman of 1,000 tons, which had come in collision with the *Alsen* near Dungeness, on the night of the 19th of August last. The *Alsen* was proceeding on a voyage from Nantes, in France, to Christiansand, in Norway. The *Vernon* was bound from London to Calcutta, with a cargo, having ninety soldiers on board, besides her crew of sixty men. On the part of the *Alsen* it was stated, that she was close-hauled on the starboard tack (the wind being S. and by E., and her course E. and by S.); that the *Vernon* was seen about half a mile distant, on her larboard tack; that the people on board the *Alsen* hailed her to bear up, instead of which, she luffed; that the *Alsen*, thereupon, kept as much more to the wind as possible, but in consequence of this proceeding on the part of the *Vernon*, she struck the *Alsen*, the vessels became entangled, and in two or three hours the latter went down, her crew being saved on board the *Vernon*. The case on the part of this vessel was, that she was in charge of a Trinity House pilot; that the night was very dark, and the wind S. $\frac{1}{2}$ W.; that she had a light at her figure-head, and kept a careful watch; that the *Alsen* was perceived at half a cable's length, coming apparently "end on;" that the *Vernon* was close-hauled, and the *Alsen* had the wind free, her studding sails being set, and that the collision was either the result of inevitable

In a suit for damage by collision, against a British vessel, the owner of the latter exonerated on the ground of the pilot being solely in fault.—Construction of the Pilot Act in respect to the appointment of pilots by the Trinity House, and by the Lord Warden of the Cinque Ports.

JAN. 22. accident, or caused by an attempt on the side of the *Alsen* to change her course, and to luff across the hawse of the *Vernon*.
The Vernon.

The Court was assisted by Trinity Masters.*

JAN. 13. *Sir J. Dodson, Q. A., and Haggard, D., for the Alsen; Addams, D., and Bayford, D., for the Vernon.*

SUMMING UP. DR. LUSHINGTON, after a summary of the evidence, left Questions. to the Trinity Masters to say, first, whether, it being a dark night, the collision was the result of pure accident; if not, secondly, whether it arose from the fault of those on board the *Vernon*; thirdly, whether the *Alsen* was at all to blame; fourthly, if the fault lay exclusively with the *Vernon*, then the Judge particularly requested their opinion whether "the pilot was alone to blame, or the officers and crew were alone to blame, or whether the collision arose from the joint default of both the pilot and some of the officers and crew of the *Vernon*; whether any erroneous directions were given by the officer of the watch or any of the crew, by the pilot, or by both. "If you have any doubt," the learned Judge observed, "I request you will retire before you make up your minds, because it is a point of great importance."

OPINION. THE TRINITY MASTERS.—We concur in opinion, that no blame or fault can be attached to the *Alsen*, but that the *Vernon* was to blame; that the pilot, by indiscreetly giving the order,† was exclusively to blame, and that the officers and crew were not at all in fault.

ARGUMENT. *Addams*, on the point of law. The pilot on board the *Vernon* was a duly licensed pilot, and although the other side say that, being off Dungeness, he was "out of pilot's water," there is no proof of it. He says himself that he had a license from the Trinity House to pilot vessels from London Bridge to the Downs, and thence to the Isle of Wight.

The contrary a mere averment. *Bayford*, on the same side. The objection, that the vessel was out of pilot's water, is merely an averment, and the pilot's evidence is sufficient to meet it.

Sir J. Dodson.—The *Alsen* is a foreign ship, run down

* Captain Stanley Clarke and Captain Ellerby.

† To keep the luff.

and totally lost by the misconduct of a British vessel, without any fault of her own officers and crew, and the occurrence took place not within the British territory, but on the high sea, common to vessels of all nations. The owners of this vessel have lost their property; they come to a Court of this country to obtain justice, and they will be a little surprised to be told, "Although you have suffered this damage without any fault on your part, you shall have no redress in a British Court of Justice." The Court will be extremely unwilling to put such a construction upon the statute. I know you sit here in a municipal tribunal, to administer municipal law; but, in such a case as this, the Court would be extremely unwilling, and the Legislature would be so, to put such a construction upon its acts, unless the law were clear and imperative. Suppose a British vessel were run down by a Norwegian vessel, there is no such a law as this in Norway, and therefore there is no reciprocity. Under the terms of the stat. 6 Geo. 4. c. 125, the Corporation of the Trinity House has not authority to grant such a license as this pilot's. The 14th section empowers the Lord Warden of the Cinque Ports to license pilots "to conduct all ships from Dungeness up the Thames and Medway, to London Bridge and Rochester Bridge; and all vessels so navigating shall be piloted within those limits by such pilots so appointed and licensed by the Lord Warden of the Cinque Ports, and by no other pilot or person whatever." Then, a Trinity House pilot had no right to conduct this vessel, and although a license had been granted to this pilot by the Trinity House, it was erroneously granted.

Haggard, on the same side. The statute says, that "no other person" but a Cinque Ports pilot shall conduct the vessel in the locality where the accident happened. In *Churchill v. Crease*,* Lord C. J. Best laid it down as a rule, that where a general intention is expressed in a statute, and afterwards a particular intention, inconsistent with the general intention, the particular intention is of the nature of an exception.

Addams, in reply. The second section relates to vessels

JAN. 22.

The Vernon.

Injustice to the foreign owner of the construction of the law.

No such law in Norway.

Trinity House no authority to grant such a license.

Rule for construing statutes.

Distinction intended by stat.

* 2 Moore & P. 420.

JAN. 22.

*The Vernon.*JAN. 22.
JUDGMENT.The pilot
solely in fault.Court's course
of proceeding
in taking the
opinion of Tri-
nity Masters.

going from London to the Isle of Wight; the fourteenth section to vessels coming from the Isle of Wight to London.

DR. LUSHINGTON.—I was exceedingly anxious that the Trinity Masters should direct their attention to the question (as neither they nor I entertained any doubt whatever that the collision had taken place in consequence of the mismanagement of the *Vernon*) to whom the blame was attributable, whether to the pilot solely, or to the pilot together with the crew of the *Vernon*; in order that the ultimate decision might embrace all the points. The Trinity Masters were clearly of opinion that the collision took place in consequence of the misconduct of the pilot alone. I think it also may be expedient to avail myself of the present opportunity to declare the course which I pursue with regard to the Trinity Masters in general. I endeavour to form my own opinion upon the papers and upon the arguments of Counsel, and I put to the Trinity Masters, both publicly and privately, no other question than one which requires nautical skill; and if it should happen (as I hope it will not) that the opinion they form may differ from mine, I should

treat it in the following manner: If there were conflicting evidence, I must then act upon my own judgment; but if the facts were perfectly clear, and the only point in question was purely of a nautical nature, I think I should be taking a great deal too much upon myself in any case to differ from the Trinity Masters.

Having made these observations, I now proceed to consider the objection raised by her Majesty's Advocate on behalf of the *Alsen*. By the Act, unless there be some exception in this particular case, according to the law administered in this and in other Courts, the owners of the *Vernon* are not responsible for any damage which may have arisen from the misconduct of the pilot on board. But it is said that the law is not applicable to this case, because it had been averred in the Act on Petition that the collision took place out of pilot's water. The objection ultimately resolved itself into this, that the pilot who was on board this vessel ought not to have been appointed by the Trinity House, but ought to have been a Cinque Ports pilot; and it

was further urged, that I ought to view this case with the most indulgent consideration, because there was no reciprocity with respect to foreign vessels; and that, supposing resort had been had to a foreign Court of Law, the decision would have been of a different kind. Now, I may here observe, that I apprehend it to be a principle of international law, though doubts heretofore arose upon the subject, that whoever sues in a Court of any country must take the remedy which is the remedy of that country alone. I take it that, if a contract is made abroad, that contract must be expounded by the law of the country where it was made, or by the law of the country where it is to be executed. But with regard to remedy, you can have no other than that ordinarily afforded by the law of the country where the suit is commenced. For instance, I will take a case which comprises all the authorities upon this subject, and is a judgment given after very great consideration; I mean the case of *Don v. Lippman*,* decided in the House of Lords. The question which there arose was this: It was upon a bill of exchange given in France, and the question was, whether in England or Scotland it would be subject to the laws of limitation as they exist here, or to the law of limitation in France; and it was the opinion of the House of Lords, overruling some previous decisions which may have been of a contradictory nature, that the remedy could only be obtained according to the law of the country where the action was commenced, and this upon the principles of international law. Now I consider myself bound by this principle, and I do not think that this is an occasion, considering how briefly this question was argued, for me to enter more at length into it; at the same time, I wish it to be distinctly understood, that I apprehend this Court will, to the utmost of its power, administer justice equally to the British and to the foreign owner. We know not what may be the distinctions existing in foreign countries, but it must be always recollected that, whether I sit in the Instance branch of the Court of Admiralty, or in a Prize Court, I can only sit under the laws of the country which constitutes the Court; that I

JAN. 22.

The Vernon.

Court bound to administer same law to British and foreign owners,

who seek a remedy here.

So held by House of Lords.

* 2 Shaw and MacL.

JAN. 22.

The Vernon.

am bound to obey an Act of Parliament both in the one Court and in the other; and that it is without precedent throughout the world, that any Court of national law should be so constituted as to ride over and supersede the ordinary common law of the country which establishes it. True it is, that a Court may be established in England by authority of Parliament, which shall say, "You shall administer the public law free from all restraint of British Acts of Parliament." But no such thing has ever been done.

Present question without difficulty.

§ 2.

With respect to the present question, it appears to me to be attended with no difficulty whatever. The sections of the Pilot Act to which I have been referred are the second and the fourteenth. The second section enacts, "That it shall be lawful for the Corporation of the Trinity House of Deptford Strond, and they are hereby required, after due examination, to appoint and license, under their common seal, fit and competent persons, duly skilled, to act as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing, as well up and down or upon the river of Thames and Medway, and all and every the several channels, creeks, and docks thereof or therein, or leading or adjoining thereto, between Orfordness and London Bridge, as also from London Bridge to the Downs, and from the Downs westward as far as the Isle of Wight." Now, if the section had ended here, and there was no other which could in any degree be put in competition or conflict with it, the case would be as clear as daylight, because in this case the vessel was proceeding from London Bridge towards the Isle of Wight, in charge of a Trinity House pilot. But there are the following words added: "and in the English Channel, from the Isle of Wight up to London Bridge." The fourteenth section empowers the Lord Warden of the Cinque Ports to license pilots, and it declares, "That it may be lawful for the Lord Warden, and he is hereby required, to appoint and license fit and competent persons, duly skilled, as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing from or by Dungeness, up the rivers Thames and Medway, to London Bridge and Rochester Bridge, and all and every the several channels, creeks, and docks of the same, and from the South Bay of

§ 14.

the Brake to the westward as far as the west end of the
owers; and all ships and vessels sailing, navigating, and
assing, as aforesaid, shall be conducted and piloted within
the limits aforesaid by such pilots so appointed and licensed
y the Lord Warden of the Cinque Ports, and by nobody
lse." Now, with regard to this point, I do not see the
lightest contradiction, because I think the second section
most clearly empowers the Trinity House of Deptford Strand
o license pilots for the purpose of navigating vessels from
London to the Isle of Wight; and because I think the four-
teenth section clearly requires the Lord Warden to license
pilots to navigate vessels from Dungeness up to London
Bridge. So far, I think, there is no degree of conflict be-
tween the two sections; and that will entirely dispose of the
resent case. But I think it right to mention, that if there
be any dispute as to the meaning of the Act, it would arise
upon the subsequent words: "and in the English Channel,
from the Isle of Wight up to London Bridge." If a Trinity
Pilot should happen to be in charge of a vessel coming from
the Isle of Wight to London Bridge, it might be said—and I
give no opinion upon that point—that there was some diffi-
culty in reconciling these two sections. This, however, be-
ing the case of a vessel going from London Bridge to the
Isle of Wight, in my opinion, the second section is perfectly
clear; and upon the authority of that section, in no degree
circumscribed by that of the fourteenth section, I am of opi-
nion that this pilot was a legally licensed pilot, and the da-
mage having arisen from his erroneous conduct, I must pro-
nounce, of course, that the *Vernon* is not liable for it.

(Costs were not asked for.)

Proctors:—*Deacon* for the *Alsen*; *Stokes* for the *Vernon*.

JAN. 22.

The Vernon.

Not in con-
flict as regards
this case.

Prospective
difficulty.

The Vernon
not liable.

THE "LORD COCHRANE."—*Motion*.—The vessel in this
case sailed from England in January, 1839, and having met
with damage, put into Pernambuco, and was there repaired.
To meet the expenses thereby incurred, the vessel, her
cargo, and freight, were hypothecated for £8,538. The
value of the vessel when she left this country was only

Application
by the holder
of a bottomry-
bond on ship,
freight, and
cargo, for
which judg-
ment had gone

JAN. 22. £4,500. On her return to England, she was abandoned by the owners, and, being sold, produced only £1,675, which had been brought into the Registry. The action against the freight had likewise gone by default, but the bond was opposed by the consignees of the cargo, who had brought in the freight, amounting to £1,085. The proceedings in the principal cause (the bottomry suit) were stopped by an injunction (24th Nov. 1841), obtained by the consignees of the cargo, from the Court of Chancery, where the suit was carried on. In the mean time, the freight, in the Registry of this Court, was attached for the seamen's wages. An application was now made, on behalf of the bondholder, to have paid out to him, not only the proceeds of the ship, but the freight. The application, as regarded the freight, was resisted by the owners of the cargo, on the ground that they had a *lien* thereon to the extent of their costs.

ARGUMENT.

Addams, D., for the consignees of the cargo. We deny the validity of the bond as against the cargo. Here is a bond hypothecating not only the vessel and freight, but the cargo, for £8,000; the vessel, after all this expense bestowed upon her, selling for only £1,675. I submit we have a *lien* upon the freight to the extent of the costs of opposing the bond.

Bayford, D., on the same side. The bond contains an extraordinary clause: "In consideration whereof, the usual risks of the seas are excepted." This bond has been given to agents. The general presumption of the law is against such a bond, so given. The facts call for inquiry.

Presumption against the bond.

The ship and freight abandoned by the owners.

Haggard, D., for the bondholder. There has been no appearance on behalf of the owner of the ship, which has been sold upwards of a year and a half. Till the expiration of a year and a day, it was premature for us to apply for the proceeds. The owners of the cargo now set up that the proceeds have been arrested for seamen's wages, and that they have incurred expenses in opposing the bond. These expenses could not have been incurred here, for they have

An ordinary case to pay the proceeds and freight to the bondholder. removed the case from the jurisdiction of this Court. It is an ordinary case, where the vessel has been sold under the decree of this Court, to direct the payment of the proceeds

and the freight (which is the property of the owner of the ship) to the bond-holder, who undertakes to give security for the wages. JAN. 22.
—
Lord Cochrane.

Harding, D., on the same side.

DR. LUSHINGTON.—I may dispose of the objection which relates to the wages in one word. It does not come properly from the owners of the cargo, but it is a proper objection; and if wages are still owing, they should be demanded against the proceeds of the ship, which ought not to be paid out till they are secured. JUDGMENT.

Wages demandable against the proceeds of the ship.

I now come to the objections raised to the payment of the freight. I understand that objection to be this—that the owners of the cargo might have a *lien* upon the freight, now in the Registry, for costs, if it should ultimately turn out that the proceedings, as against them, to make them pay this bottomry bond, are determined in their favour—in other words, if the bond is invalid as against the owners of the cargo. I am not aware that it ever has been stated in this Court that, where there has been an action against the owners of a ship and the owners of the cargo under a bottomry bond, and the owners of the ship have allowed the action to go by default, the owners of the cargo have any *lien*. They would not, under ordinary circumstances, I apprehend; but, as a matter of course, the freight would be paid out to the bondholder. Very special circumstances might be set up, which might induce the Court to hold its hand—as, for instance, if the party suing on a bottomry-bond was resident out of the country, and there was no possibility of affecting him with the costs, in case he should be condemned in them. But, in ordinary circumstances, the Court could not make such an order. What are the circumstances alleged on the present occasion? Not that the holders of the bond are insolvent; not that they are not fully capable of paying any costs in which they may be condemned, nor any one circumstance of which the Court can take tangible notice, because I cannot try the validity of the bond in this stage of the cause. It is not possible that I can say the preponderance of proof is in favour of the owners of the cargo against the bond; nay, if I were to try the case under existing cir- The owners of the cargo in such case have no *lien*.

JAN. 22. *Lord Cochrane.* cumstances, I should be compelled—perhaps erroneously—to say, that the preponderance was the other way, in consequence of the owners of the ship having allowed judgment to go by default. But I cannot form any opinion upon it under existing circumstances. Nothing has been stated to shew me that, according to law or custom, the owners of the cargo have any *lien* on the freight; that they must not, like other suitors, stand upon the responsibility of the parties in the cause with respect to costs.

There is only one other circumstance to which I must advert. An injunction has been obtained: the effect of that injunction is to tie up the hands of the holder of the bond from proceedings against the owners of the cargo, and *non constat* that that injunction may ever be dissolved. But what is the effect of the present proceedings? That while the holders of the bond are tied up from proceeding in this Court to enforce the bond against the owners of the cargo, the latter are at liberty to come here and detain the freight—till when? Till the decree of the Court of Chancery takes place? That surely can never be the case. Till the proceedings in this Court are at an end? *Prima facie* they are now at an end, because the parties are under an injunction to proceed no farther. It appears to me that the very circumstance of the injunction having been so obtained is against the opposition on the part of the owners of the cargo. I think, if no such fact had occurred, still that I should be bound to direct the payment out of the proceeds of the ship and freight; and *a fortiori* it appears to me that no obstacle to granting that is interposed in consequence of the injunction having been granted. I therefore, I think, must comply with the motion.

Proctors:—*Tebbs* for the owners; *Bowdler* for the bondholder.

JANUARY 28.

Claim by a Queen's ship to share as joint captor of a slave vessel. **THE "SOCIEDADE FELIZ."**—*Allegation.*—This was a question as to the admissibility of the Libel in a suit between the officers and crew of H.M. sloop *Harlequin*, Lord

Francis Russell, and those of H.M. brigantine *Forester*, Jan. 22.
 Lieut. Bond, both vessels being employed on the coast of *Sociedade Felix*.
 Africa in the suppression of the slave trade. The Libel, on with another
 the part of the *Forester*, pleaded that, on the 21st Novem- Queen's ship.
 ber, whilst the two vessels were lying together at anchor off — Principles of
 Cape Palmas, a strange sail was reported about fifteen miles joint capture.
 to seaward, whereupon Lord F. Russell, the senior in com- — The prize
 mand, got the *Harlequin* immediately under weigh, and, must have seen
 ordering the *Forester*, by signal, to remain at anchor till his the vessel
 return, and pick up the *Harlequin's* boats, gave chase; that claiming. — An
 the strange sail, which proved to be the Brazilian brigantine entry in the log
Sociedade Felix, seeing H.M.'s alloop, stood towards her, and of the vessel
 when within about seven miles from where the chase com- claiming to
 menced, and where the *Forester* lay at anchor, she was fired share is not
 at and captured by the *Harlequin*, in full sight of the *Fores- admissible as
 ter*, and within easy reach of her co-operation and assistance, evidence.
 if required. Upon this state of facts, the *Forester* claimed
 to share as joint captor.

Sir John Dodson, Q.A., for the actual captor, against the Jan. 22.
 admission of the Libel.—The 3rd article pleads an entry in ARGUMENT.
 the log of the *Forester*, the vessel claiming to share as joint The log of the
 captor; but it has been decided that the log of a party can- party inadmis-
 not be produced in his own favour. The "*Niemen*."* The sible.
 "*Zepherina*."† But the more important objection applies to No co-opera-
 the claim itself. It is admitted that there was no co-opera- tion on the part
 tion whatever on the part of the *Forester*; she merely obeyed of the *Forester*.
 the orders of her superior officer. A capture made in sight
 of another vessel at anchor, which renders no assistance,
 actual or constructive, gives that vessel no right to share.
 It may be a hard case, but Lord Stowell laid down the
 principle applicable to these cases in the "*Financier*."‡ It
 is the first duty of a subordinate officer to obey the lawful
 commands of his superior; views of pecuniary advantage
 are secondary only.

Bayford, D., on the same side.—There is no sufficient
 proof of association and common enterprise. Cited the
 "*Nordstern*."§

* 1 Doda. 9.

† 1 Doda. 61.

‡ 2 Hagg. A. R. 318.

§ Acton, 140.

JAN. 28. *Addams, D., for the Forester.*—These vessels were associated in a common service, the suppression of the slave trade, and were furnished with orders to that effect from the Lords of the Admiralty. It is an extraordinary principle to lay down that, because Lord F. Russell directed the *Forester* to remain at anchor, and pick up his boats, that vessel is excluded from sharing in a capture made in her sight. On principle and authority, the facts pleaded make out a case of joint capture. The "*Galen*."* The "*Aviso*."† With respect to the log, if it cannot be pleaded in this case, I do not know how it can be pleaded in any case. The log is, to a certain extent, a public document, and we plead an entry made by a person whose duty it was to make it, and who will be produced as a witness. [PER CURIAM.—You do not plead that the vessels were associated.] We plead that they were employed in the same common purpose, the suppression of the slave trade. [PER CURIAM.—That may be inferred, but it is not pleaded. The *Forester* might have been at the place by accident, to get wood and water, without any union at all. You should have pleaded that the two vessels were associated for a common object, and that, in pursuance of that common object, the capture was made.]

The log a public document, and can be proved.

PER CURIAM.

Defect of plea.

Robertson, D., on the same side, cited the "Vryheid" and the "Drie Gebroeders."§

JAN. 28. DR. LUSHINGTON.—I conceive that the general principle applicable to such claims—I mean, the claims of joint captors to the produce of slave vessels, and also the bounties formerly granted on slaves themselves, and now upon the tonnage of the vessels—was settled by the authority of Lord Stowell, in the case of the "*Aviso*." Such claims must, according to that authority, in all ordinary cases, and subject to such just exceptions as peculiar circumstances may suggest, be governed by the same rules as have, for a long period of time, been applied to cases of joint capture during war. Thus far, the case of the "*Aviso*" is a guide for my judgment; it furnishes a general rule, to which I give my cordial assent, and I shall always yield to it a willing ob-

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Case of the "*Aviso*," a guiding case.

* 1 Dods. 429.

† 2 Hagg. A. R. 31.

‡ 2 Rob. 30.

§ 5 Rob. 342.

dience. But the case goes no further. The facts pleaded in the case of the "*Aviso*" are very different from the facts set forth in the present Allegation; and though I may entertain a latent suspicion that, in some respects, the two cases more nearly resemble each other than, upon the Allegations given in, in both cases, they purport to do, it is my duty to take this Allegation exactly in the shape in which it stands, and to determine its admissibility without reference to any other facts which I may, perhaps, be inclined to think, form a part of the case. In the case of the "*Aviso*," association was pleaded; the *Faun*, the claiming ship, in pursuance of orders, put herself under the command of the actual captor. In the present case, there is no such averment, and the Court cannot assume any additional circumstances. All the circumstances before me, upon which I can found my judgment, are contained in the second article of the Allegation, which states "that, about half-past nine o'clock A.M., of the 21st of November, whilst H.M.S. *Harlequin* and the *Forester* brigantine were lying together off Cape Palmas, on the coast of Africa, at single anchor, a strange sail was reported seawards, about fifteen miles off; whereupon the *Harlequin*, being senior in command, immediately got under weigh, and gave chase, having first, however, by signal, ordered the *Forester* to remain at anchor until her return, and to pick up her boats, two of which were left behind, and which orders the *Forester* obeyed, as she was bound to do, in both particulars."

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Its distinction from the present.

The plea.

Now, here I must observe, that the Court is left entirely in the dark as to the relative bearing of the two vessels the one to the other—whether there was any connection between them beyond that which very frequently occurs. If two vessels, engaged in executing the orders they have received in the same part of the ocean, accidentally meet each other, as a matter of ordinary course, the senior in the service assumes the command, unless the inferior vessel is sailing under Admiralty orders. Here I have no information at all; but in the "*Aviso*" it was expressly stated, that the vessel claiming to share as joint-captor, in pursuance of commands issued by competent authority, was acting in obedience to

Defect of the plea.

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the orders of the capturing vessel. The Allegation goes on to state, "That the strange sail so reported, and which afterwards proved to be the Brazilian brigantine *Sociedade Feliz*, on seeing H.M. sloop *Harlequin*, gave chase, stood towards her, and hoisted Brazilian colours, and in about an hour and a quarter, and when within about seven miles from where the chase commenced, and where the *Forester* was lying at anchor, was fired at, and brought to, and captured by the *Harlequin*. That all and singular the premises took place in full sight of H.M. brigantine *Forester*, and within easy reach of her co-operation and assistance, had the same been necessary and permitted." And then the Allegation alleges, "that the *Harlequin* returned to her anchorage, of Cape Palmas, about four o'clock P.M. of the same day, and was shortly afterwards followed by the captured vessel under the charge of an officer and prize crew from the *Harlequin*."

Not pleaded
 that the prize
 saw the *Forester*.

Now both these vessels were certainly engaged in a common pursuit; but, so far as appears, the *Harlequin* had no other right to exercise command over the *Forester* than the mere circumstance of her officer, being the superior, accidentally falling in with the *Forester*. Assuming it to be so, then, the case is, that the prize was descried by both vessels; that the *Forester* was ordered to remain at anchor; that the *Harlequin* pursued and effected the capture in sight of the *Forester*. But (though a most essential circumstance) it is not pleaded that the prize saw the *Forester* at the time of capture; because it is not sufficient that the vessel claiming to share in joint capture shall see the prize, but that the prize shall see the vessel so claiming to share: and for this obvious reason—there can be no such thing as intimidation excited by the vessel claiming to share in joint capture, unless the prize descries her; and the mere fact of the vessel remaining behind, at a distance from the vessel captured, would work no effect whatever. However, there is in this case a clear inclination to capture on the part of the *Forester*, and sight by her, and an occupation in the service of the *Harlequin*—because the *Forester* is directed to pick up her boats; and if the *Forester* was seen by the

prize, then there was clearly intimidation, because Lord Stowell expressly held, that a slave vessel, so circumstanced, was to be considered in the light of an enemy; and he declared that the principle of intimidation applied with equal force, and I am clearly of his opinion. No doubt the principle does apply; for though it may often happen, as was argued, that there is a great diversity of force—the British capturer possessing greater power than could be resisted by the slaver—still many circumstances might occur that would render the assistance of a second captor invaluable; indeed, without which, the capture might never have been effected. For instance; a case of common occurrence: a calm takes place, which prevents all chance of overtaking the vessel pursued; another vessel might be most materially conducive to the consummation of the capture.

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Principle of
intimidation
applies in these
cases.

Now, the general principle—and I have thought it my duty to refresh my memory by looking back to cases of joint capture during the war—the general principle is, that a King's ship, being in sight, shall be entitled to share as joint captor; and especially where there is an actual *animus capiendi*, or where it is fairly to be presumed. Upon the present occasion, the defective state of the plea places the Court in considerable difficulty; but if it had been pleaded, "being in sight," in the proper acceptation of the term, *vis.*, that by the prize the joint captor could have been decreed, then there is no question of there being an *animus capiendi*; and all the circumstances would tend to shew that the *Forester* would have been an actual captor, unless she had been prevented by orders and directions from a superior in command. Now, none of the exceptions would apply to the present state of things; because the case of the "*Financier*" has nothing to do with this; she was out of sight at the time of the capture. If it were necessary to enforce the principle stated, I think the case of "*La Melanie*" will come in aid very powerfully, because all the general principles there stated must convince every person that the same rule which Lord Stowell had adopted at the commencement of his career, governed him down to the close, as in the case of the "*Galen*."

Necessity of
an actual ani-
mus capiendi.

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This being the state of the case, I think I shall but do justice to the parties if I direct this Allegation to be referred back, to give them an opportunity of reforming it. I think that, when reformed, in all probability, looking at the facts which have been pleaded, and the state of things as they generally exist on the coast of Africa—I am now alluding more especially to the first article rather than the second—it would be in the power of the parties so to reform the Allegation as to bring it nearly upon all fours with the case of the "*Aviso*."

The log inad-
missible.

Reasons.

But there is one objection to the third article, which I am clearly of opinion is a valid objection; I mean as to the admissibility of the log. The article, after having pleaded the contents of the log, has the following statement: "As he, the said Francis Hoof May, is prepared to depose." Now, without reference to any cases, I am of opinion that the log of the party suing never can be made evidence for any ship in its own cause. I think so upon principle; because, what would be the consequences? Why, that a vessel, during a period of war, when cases of joint capture are constantly arising, might make any statement whatever in the log, which statement might afterwards be converted into evidence on behalf of the very persons who make the statement. That is contrary to the first principles of justice. It was attempted to be argued here, that the particular form of the plea made no alteration; but in my opinion it does. The truth I take to be this—that where an entry in a log has been made by any particular individual at the time of the transaction, that individual, when he comes to be examined, has a right to refer to the entry in the log, for the purpose of refreshing his memory, that log having been made by himself at the time, and he swearing, not to the truth of the log, but, to the best of his belief, certain facts to be true, and refreshing his memory merely from the entry at the time. But the Court will not admit the contents of the log itself. In the case of the "*Niemen*," the general principle is supported, because the case was this: she had been captured, after a severe engagement, by the *Amethyst* and the *Arethusa*. The *Amethyst* fought the battle—the *Arethusa* was the actual

Case of the
"Niemen."

captor, the *Amethyst* having been very much disabled. There was no question whatever but these two vessels were entitled as joint captors; but before the capture of the prize, an agreement had been entered into between Sir Michael Seymour, of the *Amethyst*, and Captain Maitland, of the *Emerald*, and the respective officers and crews of those ships, to share jointly in all prizes that might be captured by either of them; in virtue of which agreement, the captain, officers, and crew of the *Amethyst* would be entitled to share in any proportion of the prize which might be decreed to the *Emerald*. An objection was taken by Counsel to the admission of the log-book of the *Amethyst* as evidence in the cause, on account of the agreement which had been entered into to share all prizes with the *Emerald*, upon the ground that, by assisting to establish the claim of the *Emerald*, she was, in fact, supporting her own interest under the agreement. The Court held the log of the *Amethyst* to be inadmissible as evidence, since the agreement gave a common interest to the parties. Now, whether that was the precise reason or not on which it might ultimately have been rejected, it is not necessary to consider; but the principle is very clear, and *à fortiori*, where the vessel whose log is objected to has an original joint interest. The Court was of opinion, that even a log so made, which could not have conferred any advantage on those who made it, by virtue of the joint agreement, became inadmissible as evidence in favour of a third party. I am of opinion, therefore, that for a person to attempt to use his own log is contrary to all the general principles of evidence; and therefore I must reject the third article of the Allegation.

I will again point out what is my notion of the reformation that should be made. With respect to the first article, I think it very probable, being joint cruisers (and I am entitled to look at the case with liberality), that orders might not have been issued to Captain Band, of the *Forester*, to place himself under the command of any officer superior in rank engaged in the same occupation. But that is not so essential a part of the case, as is pleaded in the second article

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How Allegation to be reformed.

JAN. 28. (if the fact be so), that the *Forester* might be seen from the prize during the chase, and at the time of the capture.
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Proctors:—*Nelson*, for the *Harlequin*; *Rothery*, for the *Forester*.

Arches Court of Canterbury.

JANUARY 29.

Nullity of marriage *impotentia causâ*.—The party proceeded against (the husband) pronounced in contempt in the Court below for refusal to obey the monition to undergo inspection, and a sentence of nullity in *pœnam*.—A protest to his appeal, by reason that it was barred by his contempt, not sustained, on the ground that the contempt had been waived.

HARRISON v. HARRISON.—Appeal.—Act on Petition.—This was a suit of nullity of marriage, *impotentia causâ*, by the *de facto* wife (designating herself as Jane Sparrow), commenced in the Consistory Court of London, where the Citation was returned, an appearance given for Mr. Fiske Goodeve Fiske Harrison, and a Libel prayed, on the extra Court-day after Trinity Term, 5th August, 1840. The Libel was brought in on the first Session of Michaelmas Term, 10th November, and admitted as reformed on the Bye-day, 15th December. On the second Session of Hilary Term, 1841, 26th January, Mr. Harrison appeared personally and gave in his answers, and on the third Session a monition was decreed against him to undergo the usual personal inspection. It was alleged by Mrs. Harrison that, on that occasion, his Proctor undertook for or declared his party's willingness to undergo such inspection, and that, on the faith of such undertaking, an appointment was made with three medical gentlemen nominated by the Court as inspectors, but that Mr. Harrison declined to attend that or any other appointment for such purpose; that thereupon the monition issued calling upon him to undergo inspection, which was returned, with a special certificate, to the effect that the party had evaded service. A further monition issued and was duly served, and on the third Session of Easter Term, 1841, there being no appearance on the part of Mr. Harrison, personally or by Proctor, he was pronounced in contempt, and his contempt was directed to be signified. A *significavit* accordingly issued to the Court of

1841.
 February 23.
 May 7.
 May 15.

Chancery, and the writ *de contumace capiendo* was extracted; and placed in the hands of the sheriff. On the second Session of Trinity Term, the Court, at the prayer of Mrs. Harrison, decreed to proceed in the principal cause on pain of Mr. Harrison's contumacy, and a decree issued against him to see proceedings, which was brought in on the third Session, in the presence of Mr. Harrison's Proctor, who, it was alleged in Mrs. Harrison's Act on Petition, on that occasion, admitted that his party had acknowledged to him that he had received a copy of this decree, which was not personally served. The proceedings went on in *pænam* till the second extra Court-day after Trinity Term, when the cause was heard, and a sentence of nullity was pronounced,* the party and his Proctor being thrice called and not appearing. Mr. Harrison appealed from this sentence; and Mrs. Harrison appeared in this Court under protest to the Inhibition, alleging that Mr. Harrison, being in contempt, was barred from appealing. On the part of Mr. Harrison, it was alleged that all the proceedings in the cause, subsequent to the Judge of the Court below directing the contempt of the party to be signified, were null and void; and further, that he was ready to submit to personal inspection. In reply, it was alleged that when the Judge in the Consistory Court decreed, on the 11th June, to proceed in the cause in *pænam*, and also a decree to see proceedings, he was aware that the writ *de contumace capiendo* had issued, and decreed upon mature deliberation, notwithstanding its issue; that no appeal from his so decreeing was entered or asserted, and that the Judge decreed to proceed, upon the Proctor for Mrs. Harrison engaging that all proceedings on the writ should be stayed, at Mr. Harrison's Proctor's request, at whose request also the decree to see proceedings was not served upon Mr. Harrison personally, and that, when it was returned, or brought in, on the 22nd June, the Proctor for Mr. Harrison admitted that his client had acknowledged to him the receipt of a copy of the decree.

Addams, D., for the Respondent, in support of the protest.—The ordinary course, where a party is contumacious,

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Harrison.

JUNE 11.

JUNE 22.

JULY 22.

1842.

JAN. 11.

ARGUMENT.

* The cause was heard in *camerd.*

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Harrison.*

The pronouncing a party in contempt does not stop the principal cause.

A party in contempt loses his right of appeal.

A waiver of the contempt in the Court below.

The party was before the Court.

The appeal should have been from the decree pronouncing the party in contempt.

Where a party is excommunicate, the cause proceeds.

to enforce the process of the Court and obtain a judgment, is to proceed in *panam*. In some cases, it is necessary to resort to a compulsory process to oblige a party to do some act; but that is no reason why the principal cause should not proceed. Suppose a wife sues her husband for separation, and the husband is decreed to allow his wife alimony, and does not pay it, he may be pronounced in contempt, and put in prison, but the principal cause still proceeds. Where a definitive sentence is obtained against a party in contempt, it is not competent to that party to appeal against such sentence. Maranta,* after defining contumacy, the *vera* and the *ficta*, lays it down as a principle, "*Verus contumax perdit beneficium appellandi*." The only case in which a question at all similar was raised, is that of *Herbert v. Herbert*,† where, Lord Herbert being in contempt, a decree was obtained to see proceedings, and a Libel was offered, upon which a Proctor for Lord Herbert appeared under protest to the jurisdiction. If the party here had been taken in contempt and put in prison, that would not have prevented the proceeding in the principal cause. The offer to proceed was a waiver of the contempt, and was so treated by the Court below; in proof of this, there is a decree to see proceedings, and on the return of the decree, Mr. Harrison is by his Proctor before the Court, for he admitted his client had received a copy of the decree. The cause proceeds regularly from Court-day to Court-day without appeal, and Mr. Harrison suffers it to go on to a hearing, taking the chance of a favourable decision.

Curteis, D., on the same side.—The act appealed from is that done on the 7th May, when the party was pronounced in contempt, which, it is said, made all subsequent acts null and void. If so, the appeal should have been from that decree. Oughton, L. tit. 303, § 506. In *Reay v. Reay*,‡ a party was excommunicated, a *significavit* issued, and next day the Judge pronounced for the divorce. In *Fitzgerald v. Fitzgerald*,§ the husband was excommunicated and his

* *Praxis*, P. vi. *De Contumacia*.

† 2 Hagg. C. R. 263.

‡ Cons. Court of London, 3 May, 1800: not rep.

§ 2 Lee's Rep. 263.

excommunication was signified, and the question was whether an Allegation could be received at his petition, and he having stated that his contumacy was not voluntary, but owing to his poverty, Sir George Lee allowed it to be suspended. Blackstone, speaking of judgment by default, says it is "where both the fact and the law arising thereon are admitted by the defendant."*

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Sir J. Dodson, Q. A., for the appellant. The first question is, whether the circumstance of Mr. Harrison having been in contempt in the Court below bars him from appealing to this Court. The pronouncing in contempt is a substitute for the excommunication of the Ecclesiastical Courts, which was the *major excommunicatio*. But the statute directs that, except in certain cases of spiritual censures for offences of ecclesiastical cognizance, excommunication shall be discontinued, and a writ *de contumace capiendo* shall issue, instead of the writ *de excommunicato capiendo*; and it enacts that § 3.

53 Geo. 3,
c. 127, § 1.

"no person pronounced excommunicate shall incur any civil penalty or incapacity whatever, in consequence of such excommunication, save imprisonment." Oughton† states that the *minor excommunicatio* is not used in judicial proceedings, and that the greater excommunication "*a sacrorum participatione, communione fidelium, omni actu legitimo, arcet; et ab ecclesiasticâ sepulturâ.*" But the statute takes away every incapacity, and even where the *major excommunicatio* was pronounced, the right of appeal, which is a sacred right, was not taken away, and since the statute, a contumacious person had still a right of appeal. It has been said that there is no instance of a person pronounced contumacious having been allowed to appeal; but the case cited, of *Fitzgerald v. Fitzgerald*, shews that a party pronounced excommunicate in the Court below was suffered to appeal. In *Wilson v. Bates*,‡ a plaintiff in contempt for non-payment of costs was allowed to proceed, and sued out an attachment against a defendant for want of answer, though he was in actual custody at the time. The case of *Herbert v. Herbert* related only to the examination of witnesses *de bene esse*. The other point is, as to the proceedings after Mr.

The stat. removes all incapacity.

Cases of appeal by excommunicate and contumacious parties.

* 3 Comm. c. 24.

† 1 tit. xi.

‡ 3 Myl. & C. 197.

JAN. 29. *Harrison* had been put in contempt. The contempt having been signified, and the writ *de contumace capiendo* having issued, it might have been enforced, and if so, the party might have been required to appear here, in obedience to the decree to see proceedings, when he was in prison. But it is

If a waiver of the contempt, the party not barred. said there was a waiver of the contempt. If so, the party was no longer in contempt, and therefore he is not barred.

[Not a waiver of the contempt itself.] [PER CURIAM. That point I wish to understand. Was there a waiver of the contempt or not? *Addams*. There was a waiver as far as the proceeding upon the *significavit*—not as to the contempt itself. PER CURIAM. Then, if a party is pronounced in contempt, in order to enable the Court to proceed *in pariam*, and there is a decree against him to see proceedings, would he be precluded from appeal? *Addams*. Certainly; otherwise a party has only to refuse obedience to an order made upon him, and take the chance of a sentence in his favour, and if it be against him, he may then appeal.

Contempt cannot be separated into parts. There is an anonymous case in *Vesey*,* in which it was held that, though generally a party cannot be heard until he has cleared his contempt, a step taken by the other party waives the contempt for all purposes, except the right to costs. The Lord Chancellor said: "The plaintiff by accepting the answer does not lose his costs, as costs in the cause; but only waives the remedy by a process of contempt, and cannot enforce payment of the costs by that process, which, by taking that step, he has given up." That supports the proposition of its being an entire waiver. I cannot understand how the *significavit* only can be waived; you cannot separate it into parts; it must be a waiver altogether, and the contumacy being waived, this is an ordinary case of appeal.

A sentence without personal inspection. The Court below has, without the evidence of personal inspection, pronounced for the nullity of this marriage. Suppose the Court to have been deceived, how serious would be the consequences! The decree to see proceedings takes no notice of the party's contempt not being to be signified. I submit that a party in contempt is not barred from appealing to a superior Court, and especially

* 15 Ves. 174.

when there is a waiver of the contempt, and a decree to see proceedings has been taken out against him.

Harding, D., on the same side. There is no analogy between this and a judgment by default, which is a final judgment, whereas this was an interlocutory decree. If a person excommunicate could have appealed, there is nothing in the process for contempt which bars an appeal. *Ayliffe*,* speaking of the effects of an appeal, says: "If an appeal be subsequent to a sentence of excommunication, the excommunication shall not be suspended:" which shews that excommunication does not bar appeal. Again:† "Though an excommunicated person cannot bring his action at law, yet he may appeal from every grievance inflicted on him before a sentence, and consequently may, *à fortiori*, appeal from a definitive sentence." We are not in contempt in this Court; we purge our contempt by appearing. If we are in contempt, we offer to purge it by appearing; if not, we can appeal. If we were in contempt in the Court below, it was on an interlocutory matter, and it was waived by the other party. It is said that it was a waiver of part of the contempt; but the anon. case in *Vesey* was a waiver of every thing but costs. The case of *Wilson v. Bates* goes the whole length of our case and further.

PER CURIAM.—I must consider this case; it is very important in point of practice. *Cur. adv. vult.*

SIR H. JENNER *Fust*.‡—The difficulty with which the Court has to contend in this case is to ascertain the exact state of the facts and the proceedings in the Court below, as no process is before it, and no statement but that in the Act on Petition; and in this case, as in others, there has been considerable laxity in the mode of stating the proceedings in the Act on Petition.

Although there are no precedents precisely analogous to

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Excommuni-
cation no bar
to appeal.

The party not
in contempt in
this Court.

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Process not
before the
Court.

* *Parerg.* 73.

† *Ibid.* 257.

‡ On the 14th January, her Majesty was pleased to grant to Sir Herbert Jenner her royal license and authority that, in compliance with a proviso contained in the will of his kinsman, Sir John Fust, he may use the surname of "Fust," in addition to and after that of "Jenner." This notification appeared in the *London Gazette* of January 18th.

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the present case in all respects, there are some cases which bear a strong analogy to it; I mean those of *Herbert v. Herbert*, *Chichester v. Donegal*,* and *Greg v. Greg*.† In these cases, the objection was taken not precisely at the same stage of the proceedings in each. In the case of *Lord and Lady Herbert*, the objection was to issuing the Inhibition; a *caveat* was entered against the Inhibition, and it being reported to the Court, in the Long Vacation, that such a proceeding had been adopted, after considering the case, the Judge was of opinion that it ought to stand over till the first session of the next term, and be argued by counsel. This was done, and the Inhibition was directed not to issue, on the ground that the matter was not an appealable grievance. In *Chichester v. Donegal*, the objection was taken after the Inhibition issued. There had been an appearance, under protest, to a decree to see proceedings; but the protest was overruled, and the Court pronounced for its jurisdiction. The Inhibition having been extracted, and an appearance given, the Libel of Appeal was opposed on the ground that, on the face of it, there was no appealable matter alleged; but the Court was of opinion that this objection came too late, and ought to have been taken at the time the Inhibition was served, by a protest to the Inhibition. The appeal was regularly proceeded in, and the result was, that the Court pronounced against the appeal because there was no appealable grievance. *Greg v. Greg* was a suit for restitution of conjugal rights in the Consistory Court of London, appealed to this Court, and an appearance was given under protest to the Inhibition, and in that case the Court was of opinion that there was appealable matter. The Protocol of Appeal set forth several grounds, some of which were held to be appealable grievances, and others not; and with respect to the former, it was held that the party was bound to appear. In a later case, that of *Sherwood v. Ray*,‡ an appearance was given under protest to the Inhibition, and the Court held that there was no appealable grievance on the face of the Inhibition.

* 1 Add. 5.

† 2 Add. 276.

‡ 1 Curt. 193. The point is not noticed by the learned Reporter; but

In cases where the matter appears on the face of the Inhibition not to be appealable, it is proper that the objection should be taken in the first instance, and if sustained, the Court can order the Inhibition to be relaxed, and where there is no question of fact, but merely of law, it is a convenience to the parties. But where, as in *Greg v. Greg* and this case, the question involves both law and fact, and the Court has not the proceedings before it, the case cannot be so disposed of. The Inhibition in this case states that it is an appeal from a final interlocutory decree, by which the Judge pronounced the marriage null and void from the first, and so it is an appealable grievance; and the party, on the face of the Inhibition, has a right to appear. But it is objected that he was in contempt in the Court below; that his contempt was not purged, and that consequently he has no right to prosecute an appeal to this Court. The questions, therefore, are, first, whether the party was in contempt; if he was, then as to the legal effect of that state.

It appears that when Mr. Harrison was pronounced in contempt, on the third session of Easter Term, his contempt was signified and a writ issued, and, as far as I can collect, placed in the hands of the sheriff; so that it was not a mere pronouncing the party in contempt, but it was followed up,

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Harrison.*

Where on the face of the Inhibition the matter is not appealable, objection should be taken in the first instance.

Questions.

Was the party in contempt?

but the Editor has a note of what fell from the Court, in pronouncing for the protest to the Inhibition. The original cause was a suit (in the civil form) of nullity of marriage, by reason of incest, brought by the father of the wife, one of the parties proceeded against. The wife, who appeared by separate proctor and counsel, in the first instance, prayed a libel; but, in the discussion on the admission of the libel, she did not oppose its admission, having, prior thereto, *authorized her proctor* to give an affirmative issue to the libel. The libel was rejected in the Consistory Court, from which sentence the party proceeding (the father) appealed to the Arches Court, the wife joining in the appeal. The judge of the Arches Court was of opinion that the wife, having been a defendant in the Court below, all her acts being in that character, had no grievance to complain of in the rejection of the libel; that she could not change her character and become a plaintiff in the Court above, and appeal from what was a benefit to her, not an injury: that, therefore, as no appealable grievance, as regarded the wife, appeared on the face of the Inhibition, the Court could not compel the party to appear absolutely to *that* Inhibition, and accordingly ordered it to be relaxed.

1836.

April 22nd.

JAN. 29.

*Harrison v.
Harrison.*

At the sen-
tence, the party
was before the
Court.

Proceeding
was not in
panam.

in order to enforce obedience to the monition of the Court that he should undergo inspection. Thus the matter remained from the third session of Easter Term till the second session of Trinity Term, when a decree to see proceedings issued against Mr. Harrison, he being in contempt, and a writ having issued ; but that decree was not served on the party. It is stated in the Act on Petition, on the part of Mrs. Harrison, that, from the third session of Easter Term, all the proceedings were had and done on pain of the party cited and his Proctor thrice called and not appearing ; and that the decree to see proceedings was not served, but when returned, the Proctor for Mr. Harrison admitted that his client had acknowledged to him that he had received a copy of the decree. If so, the party was before the Court by his Proctor, who appeared for him, and alleged that his party had acknowledged the receipt of a copy of the decree ; his appearance was recorded, and no objection was made or any thing urged in respect to the contempt. The tenour and effect of the decree to see proceedings the Court is not informed of ; the decree is not before it ; whether it stated the proceedings in the cause, and that the party was in contempt ; whether the grounds on which the decree was issued were stated, or whether it was the decree which is usual in other stages of the proceeding—though it is somewhat novel for a decree to see proceedings to issue where a party is already before the Court by Proctor. But these facts appear : a decree is issued ; the service is acknowledged by the Proctor, whose appearance is recorded, and no objection is made on the ground of the competency of the party. So I think it is not accurately represented that the proceedings after the third session of Easter Term were in the absence of the Proctor and of the party : although the Proctor might not think proper to appear and make a prayer that might bind his party, it was not a proceeding *in panam* properly so called.

It appears to me that, after the third session of Trinity Term, when the Proctor for the party cited admitted that he (the party) had received a copy of the decree, the proceedings were in a different situation from that in which they

were on the third session of Easter Term, when, the party being in contempt, and a writ having issued, he was not at that time in a situation to appear, and if he had appeared, the case then stood in different circumstances. It is stated (I dare say truly) that the decree to see proceedings issued at the suggestion of the Judge in the Court below, upon mature deliberation, and I have no doubt he felt himself justified in directing such a decree to issue. I am of opinion that what took place after the day when the Proctor for Mr. Harrison acknowledged the reception of the decree to see proceedings, and his appearance was recorded, and no objection was made to the competency of the party, was in point of fact a waiver of the contempt, and that there was a condition that no attempt should be made to enforce the writ *de contumace capiendo*; so that the proceedings after the third session of Trinity Term were with the party before the Court, though he did not formally appear by himself or his Proctor. I am of opinion that, the contempt being waived, the party, not being, therefore, in contempt, is entitled to prosecute the appeal. What would have been the effect of his having been in contempt is a question not necessary to be determined. There is no decision in these Courts to the extent that a party in contempt in the Court below cannot prosecute an appeal to a superior Court. In *Herbert v. Herbert*, the Judge declined to decide that question. I am of opinion that, in this case, the party was not in contempt in the Court below at the time the sentence was pronounced, and, therefore, he is not precluded from prosecuting an appeal, to obtain a revisal of the sentence by a superior Court. I overrule the protest, and assign the other party to appear absolutely; but I shall expect the proper steps for prosecuting the appeal to be taken with the utmost expedition, as I will not allow any delay that is not absolutely necessary.

JAN. 22.

*Harrison v.
Harrison.*Contempt was
waived.Therefore, the
party was not in
contempt.No decision,
that a party in
contempt is
barred of ap-
peal.Protest over-
ruled.

The Respondent (the wife) appealed from this decision to Her Majesty in Council, and the Judicial Committee were of opinion (assigning no reasons) that the judgment of the

June 22. -
Sentence af-
firmed by Judi-
cial Committee

JAN. 29. *Arches Court*, overruling the protest, should be affirmed; and, in order that there might be no delay, retained the principal cause (*i. e.* the appeal from the sentence of the *Consistory Court*), and assigned it for hearing forthwith, upon the evidence taken in the *Consistory Court*, rejecting the offer of the husband to submit to inspection, as coming too late.*

Proctors:—*Iggulden*, for the husband; *Townsend*, for the wife.

High Court of Admiralty.

JANUARY 31.

Salvage. — **THE "PERSIAN."**—*Act on Petition.*—This was a claim on the part of the owners, masters, and crews of two fishing smacks, for a reward for salvage services rendered to a collier brig of Sunderland. The owners, at the commencement of the action, stated the value of the vessel at £1,800. The salvors denied the accuracy of this valuation, and took out a commission of appraisement, which returned the value at £1,707. A tender of £150 was refused, and the action was entered for £500.

Commission of appraisement. — Where it does not shew a greater value than stated by the owners, costs to be borne by salvors. — Commission of appraisement must not be questioned incidentally.

The merits of the case were argued by *Sir John Dodson*, Q.A., and *White*, D., for the salvors; and *Phillimore*, D., and *Jenner*, D., for the owners.

JUDGMENT. **DR. LUSHINGTON.**—In the first place, in cases of salvage, unless there be some very gross disparity between the value stated on the part of the owners, and the actual value of the property, the Court is greatly disposed to discountenance all attempts at disputing the valuation, and taking out a commission of appraisement. But I am determined to take this step: wherever a commission is taken out, and it proves ultimately that the party taking it out has done so in error, it is but justice—and the Court will enforce the rule—that they shall pay the costs incurred by their false step. But it is

Court will discountenance attempts to dispute valuation.

* The Committee consisted of the Lord President (Lord Wharncliffe), Lord Wynford, Lord Brougham, and Lord Campbell.

stated that, on the present occasion, there were circumstances which justified the salvors in pursuing this measure. Now what are the special circumstances? If in the making of the appraisement there had been a disregard, by those appointed to make it, of the principles of right and justice, it would have been competent to either party to come to the Court for the purpose of having the appraisement set aside, and a new appraisement of the property made. But it is totally a different thing, without taking that step, which is the only one proper to be pursued, incidentally to introduce it in the Act on Petition, and enter into a long discussion, and produce affidavits, as to the mode in which the appraisement was made. It is utterly impossible, under these circumstances, for the Court ever to get at the real truth of the transaction. Therefore, in all these cases, I shall conceive myself bound—of course, leaving it open to just exceptions, where particular circumstances may call for them—where a party takes out a commission of appraisement, and the property does not exceed the value already stated on behalf of the owners, as a general rule, to condemn that party in the costs of the commission. And, furthermore, the commission of appraisement, and the execution of it, must not be questioned incidentally; but, if the party mean to impute blame to those who extract a commission, or those who make the appraisement itself, it must be done in a separate Act, and distinctly appear to the Court, so that the point may come clearly before me. I therefore, in this case, direct all the costs attending the commission of appraisement to be borne by the salvors.

(The Court awarded £270, but condemned the salvors in the costs of the commission of appraisement: the other costs to be paid, as usual, by the owners.)

Proctors:—*Fielder*, for the salvors; *F. Dyke*, for the owners.

JAN. 31.

Persian.

Where commission of appraisement is taken out, and property does not exceed owner's value, party taking it out to pay the costs.

THE "ELIZA."—*Motion*.—This was a question as to the costs attending the recovery of a bottomry-bond. The suit was brought by Messrs. Baring, Brothers, the legal holders of a bottomry-bond, against the owners of the vessel, who

The holders of a bottomry-bond, the amount of which, on re-

JAN. 31.

Eliza.

ference, was reduced one-fourth, condemned in the costs of the reference.

JUDGMENT.

did not contest the validity of the bond, but required that the charges for which it was given should be referred to the Registrar and Merchants, which was done as a matter of course. The result was, that the amount was reduced from £606 to £446, one-fourth of the whole amount.

DR. LUSHINGTON.—Under the circumstances, I think the justice of the case requires that I should give the bondholders their costs up to the time of the reference, because they had no option but to proceed according to law, by arresting the vessel, and calling upon the Court to pronounce for the validity of the bond. But, at the time of the reference, they were aware that the accounts would be contested and examined, and, considering that the demand was so large, compared with the sum which has been found to be due, I think the party making so unreasonable a demand should bear the costs from that time. So I condemn the holders of the bond in the costs of the reference to the Registrar and Merchants, and in all subsequent costs connected with the reference.

Proctors:—*Thomas*, for the bondholders; *Toller*, for the owners.

Prerogative Court of Canterbury.

FEBRUARY 3.

Administration (with will) refused to a married woman (a residuary legatee), — her husband declining to execute the proxy, or to take part in the proceeding, — notwithstanding the executors and other residuary legatees had declined to interfere.

BUBBERS v. HARBY AND HARBY.—*Motion*.—George Katz, formerly of Berbice, British Guiana, and of London, surgeon, died 11th January, 1841. He executed a will, dated 9th November, 1837, and therein named T. Harby and J. Harby executors and trustees, and his sister, Elizabeth Warren (wife of B. W.), and Eliza Munro (wife of Dr. M.), with Frances Bubbers (wife of W. B.), then living with the deceased, residuary legatees. An earlier will, dated in 1836, was at first supposed to be the only will left by the deceased, and steps were taken to obtain probate thereof, in behalf of one of the executors named therein, against a brother and one of the next of kin of the deceased; but the proceedings were abandoned on the discovery of a later

will. Mrs. Bubbers then, with a view of obtaining a representation to the estate, applied to Messrs. Harby, the executors, both of whom declined interfering in the matter. A similar application was then made to and refused by Dr. and Mrs. Munro, and Mrs. Warren being unable to take the grant, in consequence of her husband residing at Berbice, and having also declined, it was agreed that Letters of Administration with will annexed should be applied for on behalf of Mrs. Bubbers. A proxy of renunciation was accordingly forwarded to Messrs. Harby, who, however, declined to execute it, and a decree with intimation issued at May 22. the instance of Mrs. Bubbers, calling upon them to appear and to accept or refuse probate or Letters of Administration with will annexed, or to shew cause why the same should not be granted to Mrs. Bubbers. A proxy was executed by Mrs. Bubbers, authorizing the proceedings, and her proctor was instructed to apply to Mr. Bubbers to execute it also, but he declined interfering, or being a party to any proceedings on his wife's behalf, having reason to fear that he might be troubled with Chancery proceedings.

FEB. 3.
Bubbers v.
Harby.

Sir John Dodson, Q. A., moved the Court to receive as MOTION. sufficient a proxy authorizing the proceedings from Mrs. Bubbers alone, and to decree Letters of Administration with will annexed to her attorney, without her husband being joined in the Power of Attorney; citing *Suter v. Christie*;^{*} and *In the Goods of Harding*, dec.†

SIR H. JENNER FUST.—The husband, *primâ facie*, is legally entitled. How can I allow the wife to appoint an attorney? I do not see how I can protect the husband. The party has entered into correspondence with the advisers of the husband, who thinks it not prudent to take part in the proceedings, through fear of being involved in a Chancery suit and saddled with the costs. Can you shew me a case in which permission was given to a married woman to proceed by attorney without the consent of her husband? If there is such a case, it would be an exception to the general rule, and not the rule itself. In the case of *Prankard v. Cases. Deacle*,‡ the Court held that a proxy is not absolutely ne-

* 2 Add. 150.

† 2 Curt. 640.

‡ 1 Hagg. E. R. 186.

Feb. 3.
Bubbers v.
Harby.

Do not bear
 upon the pre-
 sent.

cessary, except to secure the adverse party and to protect the Proctor in acts done by him in the cause, and that the proceedings would not necessarily be nullified without a proxy. Another case, which comes nearer to the point, is that of *Suter v. Christie*, where a married woman had been appointed executrix of a will, and she was suffered to propound the will against the executor of a former will, her proxy being accepted without the consent of her husband, upon security being given for the costs of the other party, if she should be condemned therein, the husband being absent at the Cape of Good Hope, where he had been resident for many years, and it appears that she afterwards took probate of the will. But I do not think that the circumstances of that case bear upon the present. In the present case, the husband states the reason and the grounds of his refusal, and the Court thinks them not ill-founded, though the executors and other residuary legatees will not act, and he is the person to take administration. I cannot put him in a situation that may make him liable for costs beyond the property to which he would be entitled. The case of *Harding* was a different one, for it was to relieve the husband, who had no beneficial interest in the property, which was left to the sole and separate use of the wife, from whom he had lived apart under a deed of separation, and therefore it was for the benefit of the husband to be released from responsibility, and not placed in a situation to incur it.

I am of opinion that I cannot permit the wife to execute a Power of Attorney to take administration without the consent of her husband, or rather against his consent. I

Motion re-
 jected.

Prichard, Proctor.

An alteration in a will, made by the executrix and residuary legatee, on her affidavit, admitted to probate in *fac-simile*. **IN THE GOODS OF JOHN OLIVER, DEC.—Motion.**—The deceased, a victualler of Kentish Town, died 13th January last, having duly executed a will, dated 26th April, 1838, in which he named A. W. S., wife A. S., Esq., sole executrix and residuary legatee. This will contained a devise of some freehold houses at Finchley to his wife for life, and then

to his third brother, Joseph O. The wife died, and afterwards Joseph O., the brother, during the testator's life-time, the brother leaving issue surviving the testator. The will exhibited an important alteration, the effect of which was to take away from Joseph O. the absolute interest in the freehold property, and give him merely a life-interest. The attesting witnesses to the will had no recollection of observing any alteration in it at the time of execution; but the executrix and residuary legatee, in her affidavit, deposed that "she had for many years been in the habit of writing all the deceased's letters and other papers for him, and that, on the 26th April, 1836, the deceased (having previously had his will prepared by a solicitor) stated to the deponent that he had determined his brother Joseph O. should not have an absolute interest in his freehold property, as in the will mentioned, but only a life-interest therein, and desired the deponent to alter the same, which she did, in his presence, by striking the words 'his heirs and assigns for ever' through with a pen, and inserting above the same the words 'during his natural life;'" that the deceased signed his name opposite to the alteration, and then executed the will, in the presence of the deponent and of the two attesting witnesses; that, at the desire of the testator, she took the will home with her, and delivered it to her husband, who deposited it in his deed-box, where it remained locked up till the death of the deceased, and that it was in the same plight and condition as when executed. The affidavit of Mrs. S. and of her husband was the only proof before the Court.

FM. 3.
Oliver, dec.

Sir J. Dodson, Q. A., in support of the motion for probate with the alteration, suggested that the devise of the freehold would not lapse, but go to the children of Joseph O., under § 82 of 1 Vict. c. 26.

Sir H. Jenner Fust.—I think the Court may grant probate of the paper in *fac-simile*, which will leave the whole question open, and the parties may resort to such legal remedy as they may be advised to take. The 32nd section of the Act would not apply in this case, so as to prevent the lapse of the estate to the surviving issue of Joseph Oliver.

JUDGMENT.
A *fac-simile*
probate granted.

FEB. 3.

Oliver, dec.

This is not an estate tail; it is an absolute estate contingent on Joseph Oliver surviving the wife of the testator.

Pott, Proctor.

A holograph will, dated in 1837, having an attestation clause but no witnesses, by which the proceeds of a small real estate were directed to make a common fund with the personalty, refused probate.

IN THE GOODS OF LAWRENCE REEVE, DEC.—*Motion.*—

The deceased died in June last, leaving a widow and eight children. After his death, a testamentary paper, dated in April, 1837, was found in his writing-desk; it was in his handwriting, and consisted of five sheets of paper, the first four of which were signed by him, but, although there was an attestation clause at the end, it was not witnessed. The property included a small real estate, which was directed to be sold, the proceeds to make one common fund with the personalty. It appeared (on affidavit) that the deceased, having been urged to make a will, promised to do so, and in May, 1837, he stated that he had made his will, and (as the deponent understood) in a way like that in which the property was disposed of in the will; in particular, that he had named some of his neighbours as referees in case of dispute. There was a proxy of consent from the parties who would be benefited in case of intestacy.

MOTION.

Elphinstone, D., in support of the motion for probate, submitted that the presumption against the will, arising from the existence of an attestation clause without witnesses, was rebutted by the circumstances deposed to; and, with reference to the mixture of the two estates, cited *Douglas v. Smith*.*

JUDGMENT.

SIR H. JENNER FUST.—If this had been a mere disposition of personal estate, the circumstances might have induced the Court to grant probate of this paper; but the property is to form one fund, and I cannot get over the difficulty. There have been many such cases, in which the Court has granted probate of the paper, where the real and personal estates were distinct; but here they are mixed, and the real estate must go to the heir-at-law. I cannot make that a good will which the law says is not a good will, nor pronounce that to be a valid will as to personal estate,

Estates being mixed, and will invalid as to realty;

* 3 Knapp. 11.

which I know cannot be valid as to the real estate, where the whole property is to form one fund. I must reject the motion.

Denne, Proctor.

FEB. 3.

Reeve, dec.
Motion re-
jected.

HORTON v. WILMOT AND OTHERS.—*Motion*.—This was originally a cause of calling in the probate, and putting the executors upon proof, of a will, dated in May, 1834, of Sir Robert Wilmot, Bart., who died in July, 1834, by his eldest son, Sir Robert Wilmot Horton, as one of the executors of a will in 1830. On the 4th August, 1840, this Court pronounced in favour of the will opposed. The cause was duly appealed, but the appeal was abandoned, and Sir Robert Wilmot Horton, the Appellant, died soon after.

The Proctor for the Respondents now brought in a remission of the cause.

Burnaby, D., for the appellant's personal representative, applied for the costs to be paid out of the estate. The circumstances of the case are peculiar. The testator was an aged person, 84 or 85; the will was a complicated instrument, in derogation of previous testamentary acts, whereby the bulk of the property had been given to the eldest son, which benefit this will took away; it was made during the absence of the eldest son at Ceylon, and was drawn by a solicitor who was not the confidential solicitor of the deceased.

Where a will is pronounced for, and the party opposing appeals, but afterwards the appeal is abandoned, and the cause is remitted; the Court to which it is remitted cannot, at prayer of the representative of the appellant (who had died), decree his costs out of the estate, not prayed before the appeal was asserted.
MOTION.

SIR H. JENNER FUST.—The Court was of opinion that the will was sufficiently proved. What power or authority has this Court now, under the circumstances, to order the costs to be paid out of the estate? The party opposing the will is dead. [*Burnaby*.—His personal representative has executed a proxy, and the cause is remitted with all its incidents and emergencies.] I do not see that this Court can do any thing but proceed according to the tenour of former acts; that is, pronounce for the will propounded, and decree the probate to be delivered out. There is not any case in which the Court has directed the costs to be paid out of the estate, where the party opposing the will is dead :

JUDGMENT.

The party opposing the will being dead,

the Court cannot decree his costs out of the estate.

FEB. 3.

*Horton v.
Wilmot.*

the Court has no power to condemn his representative in the costs.

Feb. 26.
Motion re-
newed.

The application was renewed on a subsequent occasion, when *Burnaby, D.*, cited the case of *Dean v. Davidson*,* in which the executor, party in a cause, dying, his executor was allowed by Sir John Nicholl the costs of the deceased executor out of the estate. The costs in this case had not been applied for after sentence, lest it should have perempted the appeal.

JUDGMENT.

SIR H. JENNER FUST.—In the case cited, there had been no decision on the main question. Here was a final decision of the Court, pronouncing for the validity of the will, and decreeing probate. From that decision an appeal was asserted, and prosecuted to some extent, when the party appealing withdrew from the appeal, and the cause was remitted to this Court in the very same state in which it went to the Court of Appeal, when no prayer had been made for costs out of the estate, under a misapprehension that such an application would have perempted the appeal. That was a mistake—it was all one act, and the Court might, if it had thought fit, *ex mero motu*, have decreed the costs to be paid out of the estate. I was not asked to do so, and why should I now vary my sentence? I see no ground even upon equity. The other parties have been kept out of the probate for several months, and the Court has now nothing to do but to proceed according to the tenour of former acts. I reject the motion.

The costs
might have
been asked
after sentence.

No ground
now in equity.

Motion re-
jected.

Proctors:—*Denne* for the representative of Sir R. Wilmot Horton; *Fox* for the executors.

An executor, cited by a creditor to take probate of a will, and assigned to do so, cannot be pronounced incon-

WATSON v. TOMKINS.—Motion.—The testatrix in the cause, S. P., spinster, died in November, 1839, having executed a will whereby she appointed Mr. John Tomkins sole executor, who, at the petition of a creditor, May 5, 1841, was cited to bring in the will, and accept or refuse probate.

No appearance was given till a motion was made that he should be pronounced in contempt, when he saved his contempt (June 9) by appearing; he brought in the will, and alleged that he would accept probate. He was accordingly assigned to extract the probate within a certain time. Not having complied with this assignation,

FEB. 3.

Watson v.
Tomkins.

tempt for non-compliance.

Curteis, D., now moved that he be pronounced in contempt.

MOTION.

SIR H. JENNER FUST.—Can I compel the executor to take probate? Can I pronounce a party in contempt for non-compliance with such an assignation? Your motion ought to be for a monition against the next of kin and residuary legatee, to shew cause why administration with will annexed should not be granted to the creditor.

Motion a
wrong one, and

Motion rejected.

rejected.

Proctors:—*Heales* for Watson; *Toller* for Tomkins.

IN THE GOODS OF MARY SMITH, WIDOW, DEC.—*Motion*.—The deceased died 25th December, 1840, having made her will, whereof she appointed W. S. sole executor. She left four nephews and three nieces, her only next of kin. The will, which was dated 13th October, 1831, was written by W. S., the executor, and, by the deceased's desire, was taken care of by him after its execution. For about twelve weeks previous to her death, G. H. (one of her nephews) and his wife resided with the deceased, and two days before her death, W. S., the executor, received a message from G. H., stating that the deceased was much worse, and wished to see him respecting her will; and he accordingly, on the same day, went to her, taking the will with him. Upon his arrival at the deceased's residence, he found her confined to her bed, she being in her 84th year, paralytic, very infirm, and quite helpless, having, a few days previously, slipped from her chair and fractured her thigh. Upon his approaching her bed-side, he found her very weak, and unable to tell him what alteration she wished to be made in her will; he could understand no more than "my will," or "Giles (G. H.) will tell you." W. S. told her he could not

A will cancelled by a testatrix, with the intention of making a new will, admitted to probate on evidence of incapacity.

Fra. 3.
Smith, dec.

alter the will unless she told him what she desired to be done. G. H. and his wife, who were present, then said that the deceased had expressed a wish to alter her will. W. S. remarked it was better let alone; that she had made it whilst she was well, and knew what she was about; but if she did wish to do so, she had better destroy the old will and make another. G. H. then left the room, and W. S. again went to the deceased's bed-side, and said, "If you wish to alter your will, you had better destroy it and make another," at the same time giving the will into the deceased's hands; but she appeared to have no use at all of her fingers, and was scarcely able to hold or feel the paper. W. S. thereupon quitted the room, leaving E. H. (wife of G. H.) with the deceased, and went down stairs to G. H., whom he told that he considered the deceased not in a fit state to alter or make a will, and that it was a great pity she should try to do so, as he thought it impossible to understand what she tried to say. G. H. then informed him what the alteration was which the deceased wished to make. Upon this, W. S. returned to the deceased's bed-side, where E. H. was still standing, and found that, during the time he had been away, the will had been torn round the seal. He asked the deceased a few questions about the alterations, but getting no other information than "Giles," and "You do it," he left the room, promising to see her next day, telling her not to trouble herself about it. The next day, he went again, and found the deceased still weaker, and not able to articulate a word, so as to be understood by him; he thought her sinking very fast, and not fit to be disturbed about any thing. He shortly after quitted the house, and did not again see the deceased alive. He deposes that, during the whole of the interview, the deceased appeared dying, and he believes her to have been unconscious, and utterly incapable of doing a testamentary act; that he had several times read the will to her, after its execution, and she always expressed herself satisfied with it; and that, shortly after her death, he mended the will, by pasting some paper on the back behind the seal. G. H. and E. H. depose, that G. H. is a legatee in the will; that several times during

the last week of her life the deceased expressed a wish to alter her will, by distributing her property equally between her own and her husband's relations, and that G. H.'s mother should have a little; that, in accordance with that wish, they sent to W. S. E. H. deposed, that when her husband and W. S. had quitted the deceased's bed-room, leaving the will on the bed, she (E. H.) being present, the deceased tore the will round the seal; and that the deceased, rapidly sinking, died without alluding to her will. Two medical attendants upon the deceased deposed that she was at the time incapable of doing a testamentary act. The effects were under the value of £800.

Addams, D., moved for probate of the will.

FEB. 3.
—
Smith, dec.

MOTION.

SIR H. JENNER FUST.—The act of cancellation (for I hold it to be *prima facie* a cancellation) is sworn to have been done by the deceased herself, her intention being (if she knew what she was about) to make a new will with a different disposition. Unfortunately, the wife of G. H. was alone present with the deceased at the time of the cancellation, and she would be making an affidavit in her own favour, as G. H. would take a greater benefit by the destruction of the will. There is, however, strong evidence as to want of capacity, and I am inclined, under the circumstances, to allow the parties to take probate of the will: it would be hard to put them to proof of it in solemn form of law. Decree probate of the paper to pass.

JUDGMENT.

Puckle, Proctor.

Motion
granted.

Court of the Dean and Chapter of St. Paul's.

FEBRUARY 7.

DREW v. DREW.—*Cause.*—This was originally a suit for Restitution of conjugal rights, by Marianne Eleanor Drew against Robert Drew, her husband, a tradesman residing in the parish of St. Pancras. By way of bar to this suit, he pleaded that his wife had committed adultery, and concluded with praying for a divorce on that ground. The wife pleaded in bar.—Adultery and connivance of husband al-

Fza. 7. cause then resolved itself into a suit of that nature, in answer to which the wife alleged in bar, first, that the husband had himself committed adultery; secondly, that he had connived at her adultery, and given her a licence or permission to live with whom she pleased.

Drew v. Drew.

leged in bar to his prayer for separation. —

Charge of adultery against wife sustained; against husband not proved. — Charge of connivance against husband proved. — Both parties dismissed. —

What amounts to connivance, or license.

The parties were married in 1819. In August, 1838, differences having arisen between them, they agreed to live apart, and the husband allowed the wife 12s. a week. The husband's plea alleged that Mrs. Drew, whilst residing in lodgings at Camden Town, cohabited with a person named Power, which fact did not reach his knowledge till September, 1840. The wife, in her Allegation, pleaded that, not long after the separation, a niece of her husband (the daughter of his own sister) came to reside with him, and that they carried on an adulterous and incestuous intercourse; that, in order to induce her (the wife) to accept 8s. a week, instead of 12s., her husband proposed to her, that she might, on that condition, live with any man she pleased, which proposal she rejected. A further Allegation by the husband (the fourth plea in the cause) denied any improper connection between himself and his niece, and pleaded that she resided with him as his housekeeper.

Evidence of connivance by the husband.

Upon the point of connivance, the evidence was contained in the depositions of two witnesses, named Willmore and Carpenter (friends of the husband), the persons through whom (according to the wife's plea) the license from the husband was communicated to her. The former stated that he had been appealed to by the parties, prior to their separation, respecting their differences; that, in September, 1840, the husband came to him and said he should not continue his allowance to his wife, as she was living with another man; that the witness advised him to compromise the matter, and not send his wife into the streets, and, at witness's persuasion, he agreed to allow her 8s. a week, upon condition that she ceased to live with Power; that he did not propose to Mrs. Drew, on the part of her husband, that she might live with any man she chose if she accepted 8s. a week; Mr. Drew once said something of the kind to him, in a careless way, and not as a proposition which he was formally to

repeat to his wife, that "she may live with whom she pleases, if she takes the 8s. a week;" that he did not mention this as an inducement, nor did the witness propose it as such to Mrs. Drew; on the evening of the same day, he let it out casually to her, in this way: "Mr. Drew says you may live with whom you like, if you take 8s. a week." Carpenter (who was also examined on the husband's plea) deposed that, in January, 1841, Drew told him to ask his wife to take 8s. a week, instead of 12s.; he wished him to name this to her, not as an offer, thinking, if he made a specific offer, he should be obliged to maintain her; that he (the witness) did propose to Mrs. Drew to accept 8s.; he made such offer by the authority and with the sanction of the husband; he did not exactly offer it, he asked her if she would take it, and advised her to do so; it was on the implied understanding that her husband would not interfere with any mode of life she might adopt or any connection she might form; it was on that express understanding on the part of the husband that 12s. a week had been offered to and accepted by Mrs. Drew in the first instance. This was stated by the witness in his cross-examination upon the husband's plea; in his deposition in chief upon the wife's Allegation, he stated that he did not recollect being authorized by Drew to make any such proposal as that, if his wife would accept 8s. a week, she might live with whom she pleased, and he denied making such an offer; he remembered an excited expression on his part, that "his wife might live with the devil if she pleased." With respect to the husband's adultery, a woman named Green deposed to having seen from the street, through the blinds of Drew's bed-room window, a female enter, undress, and put out the light, and shortly after, Drew himself enter the room, undress, and put out his light, as if going to bed.

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Of his adultery.

Addams, D., for the husband, contended that there was no proof, either of the adultery of the husband, or of his connivance. The wife herself could not have understood that the 12s. a week was accepted on condition that she might form any connection she pleased, as Carpenter through some misunderstanding had stated, for she had not so pleaded,

Dec. 24, 1841.

ARGUMENT.

Inconsistency of evidence with wife's plea.

FEB. 7. in her first Allegation, having confined the offer to the 8s. a week ; and Willmore proved that the allowance of 8s. was on the express condition that the wife should desist from her adulterous connection with Power.

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Sir John Dodson, Q. A., on the part of the wife, maintained that, on the testimony of the husband's own witness, Carpenter, it was difficult to conceive that a license could be given to the wife in more distinct terms. With respect to his adultery, the facts spoken to by Green, and the admission by the husband, and by the niece, in her examination, that the latter was in the habit of entering Drew's room at night, were sufficient to support the charge of adultery. The question as to the wife's adultery he left in the hands of the Court.

License distinctly proved.

Husband's adultery sufficiently established.

1842.
February 7.
JUDGMENT.

Circumstances connected with the separation.

DR. PHILLIMORE.—The course of the proceedings in this case has not led to the development of any detailed history of the married life of the parties : as far as appears, their cohabitation was uninterrupted for nineteen years, when they signed an agreement to live separate from each other. The witness who speaks to the circumstances connected with this separation is Carpenter, an opposite neighbour, a mutual friend both of the husband and of the wife, and who has been examined on the Allegations given in by both parties. He states (in answer to an interrogatory) : " The Producent did treat the Ministrant with cruelty, at times ; I believe he did beat her, at times ; she has taken refuge in my house to avoid his violence ; I have seen her with a blackened eye and with bruises on her person, which I had reason to believe were occasioned by the violence of the Producent." With reference to the agreement, he says : " I knew that Mr. and Mrs. Drew were often quarrelling, but to the causes or particulars of their differences I cannot speak. On the occasion of their last quarrel, Mrs. Drew came to my house for protection ; I drew up an agreement between them, which they each signed, and each had a copy of it. That agreement was signed in the summer of 1836, and from and after that time, I used to pay Mrs. Drew 12s. a week, as from her husband. Mr. and Mrs. Drew lived separate and apart from and after that time."

Under this inauspicious agreement, a cohabitation of nineteen years was rent asunder; the husband and wife were thrown loose upon the world; and it does not appear to me a singular result, or one inconsistent with the ordinary march of human infirmity, that, within two years from the date of this separation, the husband and wife should both come forward in the Ecclesiastical Court to charge each other with the commission of adultery. It is, however, the duty of any Court which has cognizance of suits of this description, not only to sift the evidence of the alleged adultery, but carefully to examine whether any toleration or passive sufferance of adultery is connected with a separation, odious in the eye of the law, which has taken place under circumstances so tainted with suspicion; for it is always to be borne in mind that all separations, merely voluntary, are illegal.

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*Drew v. Drew.*Voluntary
separations
illegal.

I entertain no doubt that the charge of adultery against Mrs. Drew is substantiated. It is true, no direct act of adultery is proved against her; this has frequently happened in cases of this description; but the facts spoken to by the persons in whose house she lodged, connected with the visits of Power, and his passing whole nights with her, in an apartment in which there was only one bed, lead to the legal conclusion that, since the separation, she has been guilty of the crime with which she has been charged.

Adultery
against the
wife, proved.

The adultery of the husband is pleaded to have taken place with Susan R., his niece, who was under twenty-one years of age. The utmost proved against her is, that, having been a servant with Mr. and Mrs. Drew some years before, she had returned to live with her uncle after his separation from his wife; that she constituted his whole family, and was the only inmate of that portion of his house which he retained, the upper part being let out to lodgers; that they occupied the only two bed-chambers he had retained, which opened on the same landing-place, the doors being immediately opposite to each other; and that it was the habit of the niece, before she went to bed, to comb her hair before the looking-glass in her uncle's room, that looking-

Adultery of
the husband,

FEB. 7. glass being more conveniently situated for the purposes of such an operation than her own, inasmuch as it was placed on a chest of drawers, while that in her room was over the chimney-piece. Susan R. (who has been examined by the husband as a witness to disprove her own adultery) admits these facts; and beyond them I see nothing stringent in the evidence; and, in my judgment, these facts are not sufficient to establish the grave charge of incestuous adultery preferred against Mr. Drew.

Drew v. Drew.

not proved.

Evidence of
connivance. I now proceed to consider the evidence on Mrs. Drew's second charge against her husband. The wife's Allegation pleaded that Mr. Drew, for the purpose of inducing the wife to consent to a reduction of the allowance of 12s. a week, secured for her maintenance and support by the agreement, several times proposed to her that he would consent to her living and cohabiting with any man she pleased, provided she would submit to receive for her maintenance and support 8s. a week; but that, she having on all occasions rejected the terms so proposed by him, he had discontinued and refused to pay the sum of 12s. a week. Carpenter is one of the witnesses examined in support of this article; he had previously been examined as a witness on behalf of the husband, and had deposed (in answer to an interrogatory addressed to him by the wife) that the husband did propose to make an allowance of 8s. per week to the wife. "He requested me to ask her if she would take 8s. a week. He assigned no reason for proposing to reduce the allowance from 12s. to 8s. a week. I suppose he thought, she having committed herself, he could not be compelled to allow her any thing, and that he would, therefore, offer her what would be just enough to enable her to live, when added to what she might earn by her own exertions. I did offer her 8s. a week, instead of 12s., which had been previously paid to her. I did make such offer by the authority and with the sanction of the husband. I did not exactly 'offer' such allowance to the wife, because the husband understood that, if he made her an offer, he would be liable to maintain her. I asked her 'if she would take it,' which was, in fact, one and the same thing as offering it to her. I did advise her to accept

such offer. It was upon the implied understanding on the part of the husband, that he would not interfere with or object to the course of life that the wife might lead, or any connection she might form, that such reduced allowance was offered to her. It was upon that express understanding on the part of the husband that the 12s. a week had been offered to and accepted by the wife in the first instance." FEB. 7.
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It is impossible that evidence can be more clear and positive. I can read it no otherwise than that the original agreement for a separation was connected, in the very first instance, with a license from the husband to his wife, that she might indulge in the commission of adultery, and the law and practice of the Ecclesiastical Courts hold the husband strictly to any admissions which his own witnesses may make, though the fact may not be put in plea, which may have the effect of establishing a bar to his claim for a divorce. Lord Stowell, in *Timmings v. Timmings*,* says:—"It is incumbent on the husband to make such proof as shall not involve him in a legal bar; for if, by the evidence which he brings to establish adultery, he at the same time involves and implicates himself, the wife has the full benefit of this evidence; nor can he avail himself of a case in which he does not appear with clean hands." I apprehend that, according to all the rules of evidence, the Court is entitled to hold the husband strictly to any facts which come out in the evidence produced by himself.

I now proceed to the evidence produced by Mrs. Drew. Upon her Allegation, Carpenter says:—

In January last, Mr. Drew asked me to name it to Mrs. Drew, whether she would take 8s. a week, as an allowance, instead of 12s. He did not authorize me to make her an offer of 8s. a week, but merely wished me to name it to her, with a view to ascertain whether, if he were to make her such an offer, the same would be accepted by her. I cannot recollect that Mr. Drew mentioned any thing to me which I should mention as an inducement to Mrs. Drew to induce her to take the 8s. a week. I cannot call to mind any thing of that sort. He merely said to me, "Ask her if she will take 8s. a week;" adding, "and she may think herself very

* 3 Hagg. E. R. 76.

Feb. 7.
Drew v. Drew.

well off if she gets it"—some short observation of that kind I know he made. I do not recollect that I ever held out such an inducement to Mrs. Drew, as that she might live and cohabit with whom she pleased, provided she would accept the reduced allowance of 8s., or that Mr. Drew ever authorized me to make such a proposition to Mrs. Drew.

In his former examination, he expressly stated that he was authorized to make such a proposition. The other witness, Willmore, says :—

I did not make any proposition to Mrs. Drew under the direction of her husband in January, 1841 ; it was in September, 1840, that that occurred. Mr. Drew came to me, and said he would not allow his wife money any more, and that she had been living with another man : it was on that ground he objected to continue the allowance to her. He said he would not support his wife and the man too. My advice to Mr. Drew was, that he ought not to drive his wife into the streets by refusing her the allowance. I advised him to compromise the matter with her. On my persuasion, he agreed to allow her 8s. a week ; he would not allow her any more. Mrs. Drew refused to take any less than 12s., the same he had been accustomed to allow her. I never proposed to Mrs. Drew, on the part of her husband, that he would consent to her living with any man she chose, if she would accept the allowance of 8s. a week. Mr. Drew once said something of that kind to me ; he said it in a careless way, not at all seriously, or as a proposition which I was formally to report to Mrs. Drew ; it was as he was going out from my house, after conferring with me about his wife, that he said it. He said it in a careless way, speaking of his wife, " She may live with whom she pleases, if she takes the 8s. a week." This is all about it. I wish it clearly to be understood, that he did not say it as an inducement ; neither did I hold out such a proposition to Mrs. Drew as an inducement to her to accept the reduced allowance of 8s. a week. On the evening of the same day on which Mr. Drew had let fall the above-mentioned expression to me, I reported it casually to Mrs. Drew. She questioned me as to what her husband had said to me. I told her, in answer to her questions, " He says you may live with whom you like, if you take the 8s. a week.

Conclusion.

I think, therefore, I am bound to hold Carpenter to the evidence he gave on his first examination. He was then the husband's witness, and there is every probability that, when

first examined, he stated the facts correctly, without reflecting on the legal consequences which might be deduced from his admissions. His language is most clear; there was "an express understanding"—he being the person who drew up the agreement between the parties—that the husband, if the wife consented to the separation, would not object to any connection she might form, or any course of life she might adopt. It appears equally clear that, when Mrs. Drew, deprived of the society and protection of her husband, and banished from her natural home, fell into a course of adultery, the husband, perfectly insensible to his own dishonour, looked at the whole transaction in a pecuniary point of view, and directed his immediate object to the reduction of 4*s.* in the amount of her allowance. When I look to the whole *res gesta*, to the illegal separation (as I consider it) between these parties, by which a termination was put to a cohabitation of nineteen years; when I look to the nature and terms of the agreement, as described by the person who drew it up, and to the absence of the document itself, I cannot but regard this as a case in which the husband has given a corrupt facility, if not an intentional permission, to his wife's adultery, and, by so doing, has barred himself from the remedy to which he would otherwise be entitled; and I dismiss both parties from the suit.

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*Drew v. Drew.*Both parties
dismissed.Proctors:—*Clarkson* for the husband; *Wadeson* for the wife.

Prerogative Court of Canterbury.

FEBRUARY 12.

IN THE GOODS OF MARY ANNE MOGG, WIDOW, DEC.—
Motion.—The deceased died a short time since, leaving a will dated 3rd June, 1841, and a codicil dated the 29th June, 1841. The codicil appointed an executrix, in the following words: "This codicil I add to my will. On reconsideration, I consider it would be a great trouble to Fanny Gray, and therefore my kind friend, Charlotte Elizabeth Ledwich, has agreed to oblige me by seeing this affair pro-

A will, dated after the statute, containing unattested alterations, to which will a codicil duly executed was subsequently attached, admitted to probate

Fxx. 12.

Mogg, dec.

as it stood, the
codicil being
held to have
republished the
will.

perly arranged. I therefore appoint her my executrix." The will exhibited several alterations, which, with the making of the codicil, arose out of the following circumstances. In June, 1841, C. E. L. (the executrix) was residing in the same house with the testatrix, who, on the 29th, expressed a wish to appoint her executrix, instead of Fanny Gray, so named in the will. Whilst in conversation, the servant, whom the testatrix had usually called "Caton," entered the room, and the testatrix then ascertained that her true name was "Mence." The servant having quitted the room, the testatrix, with her own hand, in the presence of C. E. L., wrote the codicil, and altered in the will the name of "Caton" to "Mence," and the name of another legatee from "Renton" to "Burton." To both these alterations the signature of the testatrix was affixed, and the last was dated "29th June, 1841." She also erased the name of Fanny Gray. The testatrix, having first annexed the codicil to the will by a wafer, sent her servant Mence for three persons to attest her signature to the codicil, which she executed in their presence, and they duly attested the same. The only person present when the alterations were made in the will was C. E. L., the executrix, and she (being a competent witness under §17 of the Act) deposed to their having been made prior to the execution of the codicil, and the servant, Mence, deposed to the inquiry respecting her name, to sending for the witnesses, and to seeing the papers annexed together on the table; and also that, after the codicil was executed, the testatrix deposited them in her desk, and, on the same day, about an hour after the execution of the codicil, the testatrix took the papers then annexed from the desk, and gave them to Mence to shew to W. S., one of the attesting witnesses to the codicil, in consequence of his stating to her that he did not know what he had signed; when Mence and W. S. noticed, for the first time, the alterations in the will. The other witnesses could not depose that they were made when they attested the codicil: two of them could not state whether the codicil was annexed to the will at the time; the other (W. S.) "believed" it was so. A bequest was written under the wit-

nesses' signatures at the end of the codicil, and signed by the testatrix, but without date or attestation, and C. E. L. deposed that it was not there when the codicil was executed. This bequest was therefore void. The property was under £2,000.

FER. 12.

Mogg, dec.

Haggard, D., moved for probate of the will and codicil, *MOTION*. as originally executed.

SIR H. JENNER FUST.—The only difficulty is as to the *JUDGMENT*. mode in which the probate should go out. There is no doubt that the alterations were made after the will was executed, and before the execution of the codicil, and the question is, whether the effect of the codicil is not to republish the will? Every codicil is a republication of the will. I decree probate of the will and codicil to pass as the will now stands. The clause (§21) of the Act is very obscure.

Rothery, Proctor.

High Court of Admiralty.

FEBRUARY 17.

THE "HARRIETT."—*Act on Petition.*—This was an Act on Petition to assist the enforcement of a monition against the sureties (Messrs. Marshall and Gore), who had given bail for the owner, to answer an action in a cause of damage by collision between two vessels, the *Harriett*, owned by Mr. James Gillies, and the *Woodpark*, of which Mr. James Whitehead was managing owner, and at whose instance the *Harriett* was arrested in October, 1840. On the 12th November, bail in the usual form was given. On the 19th March, 1841, the cause came on for hearing, when the Court, assisted by Trinity Masters,* pronounced for the damage, condemning the owner and bail therein and in the costs; and, in the usual manner, referred it to the Registrar and Merchants to ascertain the amount of such damage and costs. According to the Minutes of the Court, nothing further was done in this matter until the 6th July, when the Proctor for the party suing alleged, and the Proctor for the

Liability of sureties of a bankrupt owner discharged by reason of an arrangement between the parties in the cause to waive the reference to the Registrar and Merchants, and to settle the amount of damage by agreement,—held to be a deviation from the original contract by which the sureties were bound.

* See 10 *Monthly Law Mag.* 221.

FEB. 17. *Harriett* admitted, the damage to amount to £369 ; and at the same time, at the petition of the Proctor for Mr. Whitehead, a monition was decreed against the owner of the *Harriett*, and the bail also, for this sum. On the 4th of August, the monition was returned, personally served, and an attachment was prayed against the owner and bail. The Dean of the Arches, then sitting for the Judge, directed the motion to stand over. On the same day, the costs were taxed at £101, and a monition was decreed for their payment. On the 8th September, the monition for the payment of costs was returned, and the Proctor for the party suing alleged the owner to be a bankrupt, and prayed an attachment against the bail. The Surrogate directed this motion to stand over. On the 4th November, the Proctor for the party suing renewed his motion for an attachment against the bail for non-obedience to the monition calling upon them to pay the damage and costs, exhibiting the *London Gazette* of 24th August, 1841, shewing that Mr. Gillicie, the sole owner of the *Harriett*, was a bankrupt. An appearance was then given by a Proctor on behalf of the bail, and he prayed to be heard on his petition against the attachment. An Act on Petition was entered into, and, on behalf of the bail, it was alleged that they were released from their liability, and entitled to be dismissed from the effect of the monition of 6th July. On the part of the owner of the *Woodpark*, the prayer was, that the bail might be compelled to pay the damage and costs. The Act on Petition did not refer to the monition for costs, or to the attachment prayed for disobedience to that monition ; it was confined solely to the monition for the payment of the damage and costs, and the attachment was prayed on that account. The fact relied on as producing the legal consequence of relief to the bail was, that the owner of the *Woodpark*, having obtained a decree pronouncing for the damage, and referring it to the Registrar and Merchants to assess the amount, instead of pursuing the tenor of the decree, without the knowledge, privity, or consent of the bail, proceeded to settle the amount by private negotiation in the North, and that the bail were not informed of such negotiation till after the 11th of June, when

the following letter was addressed to Mr. Marshall, one of the bail :—

FEB. 17.

The Harriett.

North Shields, June 11, 1841.

Dear Sir,—After a good deal of trouble, I have at last got the damage matter for *Woodpark* and *Harriett* settled by payment of £369, at two, four, and six months from this date, for notes payable with you, and your joining your name with mine. You will, therefore, much oblige me by joining in the same, and I will provide in time for them at maturity.

Remaining, yours truly,

JAMES GILLIES.

Mr. Marshall sent the following answer :—

Dear Sir,—I have this morning received your letter of the 11th inst., asking me to join you in security for the payment of £369, at two, four, and six months, for the claims of the ship *Woodpark*, for damage done by the *Harriett*; and to-day Mr. Wadeson called upon me with the bills. I really think, before you drew up the bills, it would have been the correct course to have asked whether I would do so. The fact is, transactions of this nature are not what I like; you must, therefore, permit me to decline joining you in the security.

I am, dear Sir, yours truly,

GEORGE MARSHALL.

It was sworn, and not denied, that this was the first intimation Mr. Marshall received of the negotiation; and Mr. Gore swore that he knew nothing of the decree, or any of the subsequent proceedings, till he was served with the monition. On behalf of the bail, it was further alleged that, had the reference been prosecuted to the Registrar and Merchants, according to the decree, there would have been ample time to enforce payment from Mr. Gillies, the principal, before he became insolvent.

Haggard, D., for the bail. My first objection is, that the application for an attachment is premature. Before the Court can be called upon to proceed penally against the bail, by attachment, Mr. Whitehead should prove his debt against the bankrupt's estate, and if there be a deficiency of assets, he may then come before the Court for a monition against the bail. My next objection is, that in the form the proceedings assumed subsequent to the decree of the 19th

January 28.

ARGUMENT.

Application premature.

Party should prove against bankrupt's estate.

FEB. 17. March, 1841, it is not competent to Mr. Whitehead to have the process of the Court enforced against the bail. Messrs. Marshall and Gore bound themselves to answer the action, and "to bring forth J. G. into judgment, to abide the hearing of this cause whenever it shall be assigned, and likewise to pay what shall be adjudged, and the expenses."

There has been no adjudication. But there has been no adjudication in this Court: the bail were no party to the minute of the 6th July. What they undertake to do is, to pay what shall be adjudged; but there has been no adjudication, as there has been no report from the Registry to the Court.—[PER CURIAM. If I were to adopt this objection, would it do more than protract the case? Might there not be a report to the Registrar and Merchants still?]

PER CURIAM. Independent of these objections, the party is precluded by his own conduct from praying a monition or attachment against the bail. The creditor has been in so much *laches*, that he is not in a condition to act upon the decree of the 19th March, and the Court cannot lend its aid to enforce a private arrangement between the principal parties, in which the bail were not consulted, and in which time has been given to the principal. The "*Vreede*;" * *Wright v. Simpson*; † *Thomas v. Young*; ‡ *Hawkshaw v. Parkins*; § *Mayhew v. Crickett*.|| These cases shew that, where time is given to the principal, the sureties are released. The application fails, therefore, on these three grounds: 1, that it is premature till the estate of the bankrupt is found deficient; 2, that, by the terms of the bail-bond, the sureties are not bound by a private arrangement; and, 3, that the creditor has, by his own conduct, and by giving time to his debtor (the principal), released the bail, and their obligation is thereby extinguished.

Addams, D., contra. The bond binds the sureties to pay the amount of damage adjudged and expenses. Now what was adjudged was the amount of damage done by the *Harriett*. The question in the first instance was, how was the amount to be ascertained? A reference (which was no substantial part of the decree) was made to the Registrar and

* 1 Dods. 1.

† 6 Ves. 734.

‡ 15 East, 617.

§ 2 Swanst. 546.

|| *Ibid.* 185.

The amount adjudged, is that of damage done.

Merchants, in the usual way ; but if the parties agreed to an arrangement as to the *mode of ascertaining* the damage, will that release the bail ? No. The real question at issue is, whether any thing has been done by the owner of the *Woodpark*, subsequent to the decree, which has released the responsibility of the bail, that is, to pay what shall be adjudged, which is the amount of damage done by the *Harriett*, and that is admitted by both Proctors to be £360 and the costs, which were taxed by the Registrar, and confirmed. There was no arrangement for the settlement of the claims out of Court, but only for the adjustment of the amount of the damage without reference to the Registrar and Merchants, since it could be more easily ascertained in the North, where the damage was repaired. This was for the benefit of the bail, who would have had to pay the expense of the reference to the Registrar, which might have been protracted, had delay been the object, by objections and hearings. We aver that Gillies was insolvent before the sentence on the 19th March. We refused to enter into any negotiation without the privity of the bail ; we would not take the notes of the principal unless signed by the bail. The affidavit of Mr. Dale proves that the only proposal made by one party and acceded to by the other, was as to the mode of ascertaining the amount. How could this have prejudiced the bail ? They would have benefited thereby. The proposal and agreement to accept in payment joint bills from the principal and the bail, is not "dealing with the principal behind the backs of the bail." In the "*Vreede*," the party suing the bail was in *laches* ; here every due diligence has been employed : had greater urgency been used, it might have been said that we had precipitated the bankruptcy of Gillies.—[*PER CURIAM*. Merely giving time does not discharge a surety ; four or five months ago, the Judicial Committee of the Privy Council decided that point. In the "*Vreede*," there was mere lapse of time, in which nothing was done. If there is a distinction between that case and yours, it is that you have done something—*quære* what?—Then the question is narrowed to this : whether the owner of the *Woodpark*, under the circumstances, agree-

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The Harriett.

Arrangement as to mode of ascertaining the damage will not release the bail.

No arrangement for settlement of claims out of Court.

No negotiation without privity of bail.

They would have benefited by the arrangement.

PER CURIAM.

FEB. 17. ing with Gillies, not as to the payment of the amount of the damage, but as to the mode of ascertaining that amount, releases the bail from liability?
The Harriett.

A decree by consent binds the party; why not his bail? *Curteis, D.*, on the same side. A decree by consent on the part of Gillies would bind him; and would it not bind his bail? The bail stand instead of the ship, and are bound to answer for the owner, and he confesses the damage to be £360. It is a mere quibble to say there is no report; the damage is as much adjudged as if there had been a report. The liability of a surety is not discharged by the delay of a creditor. *Eyre v. Everett.* Trent Nav. Co. v. Harley.†*

FEB. 17.
JUDGMENT.

DR. LUSHINGTON.—Questions of the description which have been raised in this case are of very rare occurrence in this Court; but when they do occur, as we are not familiar with the doctrines which apply to them, they call for great deliberation as to all the facts and circumstances, and the principles which are applicable to them.

First question,
 What is the law
 applicable to
 the case?
 That of a Court
 of Equity.

My first inquiry is, generally, what is the law which I am to apply? And I apprehend the answer to that question must be, that I must be governed by the rules which prevail in the Courts of Law and Equity in this country; for I know not any general principles of maritime law different from those adopted in our own jurisprudence, which could be introduced into this case. If a Court of Equity could afford relief, though a Court of Law would not, it would be my duty to afford relief to the bail; for I apprehend, according to the authority of my predecessors, that I sit here exercising an equitable as well as a legal jurisdiction. I do not think it necessary to enter into the distinctions as to relief being afforded in law or in equity; because I must relieve the bail if they are entitled to be relieved either at law or in equity.

What is the
 tenor of the
 obligation?

Having settled what is the law by which I shall be governed, I will now consider the tenor of the obligation. The obligation into which the sureties have entered, and the effect of a surety's obligation, in all cases, is a matter of the first importance to be distinctly understood, because it is by virtue of the obligation only that the sureties can be bound, and

* 2 Russ. 381.

† 10 East, 34.

they are bound to the extent of that obligation, but not beyond its plain and obvious meaning. Now, the sureties, in the present case, are bound to answer the action, the meaning of which is expressed by the words that follow:—"To bring forth the said James Gillies into judgment, to abide the hearing of this cause whenever it shall be assigned, and likewise to pay what shall be adjudged, with expenses." ^{To pay what shall be adjudged.}

Now there might by possibility be, in some cases, a doubt entertained as to the construction of this obligation; because it might be contended that all that the sureties undertook to do was to bring forward James Gillies into judgment, to undertake that he should pay what should be adjudged, and of course it would follow that, if he did not pay, they must; and that might give rise, in certain cases, to an argument, how far it would be necessary to prosecute the principal in the first instance without resorting to the bail. But I am of opinion that that question cannot arise upon the present occasion, for this plain reason: that Mr. Gillies, the principal, is a bankrupt, so that the money cannot be recovered from him, and of course, whether the bail are responsible in the first instance to pay without regard to his solvency or not, he being evidently insolvent, it comes to the same question in point of law. These being, then, the terms of the obligation, the first question I have to propose is, are the bail, under the circumstances I have stated, liable, by virtue of this obligation, to be attached for not performing what they undertook to do? ^{Can the bail be attached for non-performance?}

With respect to an attachment for not paying the amount of damages agreed to by the principal with the parties suing, I entertain not the least doubt that it cannot be decreed; for the bail are not bound by the obligation to pay any thing, save what may be "adjudged by the Court;" and most clearly the sum agreed upon was no adjudication by the Court, and had I been apprized of the facts when a motion was decreed against the bail on the 6th July, no such monition would have issued. Indeed, all that was done on the 6th July is, as regards the responsibility of the bail, a proceeding which would not probably have taken place had these questions been more familiar to ^{Sum agreed upon not an adjudication by the Court.}

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the practitioners of this Court. It being clear, therefore, that, in this state of things, no attachment could be decreed by reason of non-payment of the agreed damages, I must now determine whether I could direct an attachment to issue on account of the non-payment of costs.

Here, again, I must look, first, to the terms of the obligation: "to pay what shall be adjudged, with expenses." Now, I am of opinion that there is no obligation entered into by the bail to pay costs separate and distinct from the costs upon an adjudication of damages; that an adjudication of damages must necessarily precede or accompany a decree for costs; and that, therefore, there being no such decree, I cannot order any attachment to issue on account of costs.

The observations I have now made dispose of the prayer made by the Proctor for Mr. Whitehead; for I cannot, *rebus sic stantibus*, compel the payment of damages and costs; if I were to attempt to do so, I should impose a new obligation on the bail, contrary to and beyond that which they originally entered into.

The Act on Petition, on behalf of Mr. Whitehead, concludes in these words:—"Mr. Engleheart submitted that, by reason of the premises, the bail were not, and are not, in any manner, discharged from their liabilities as bail to answer the action in this cause, and he prayed that they may be compelled to the due payment of the amount of the damage and costs which have been pronounced for, and that they may be condemned in the further costs of the present Act on Petition." What I have said, though it disposes of the question of attachment, does not dispose of the whole of the case; it does not dispose of the prayer on behalf of the bail, which must also be considered, namely, that the

Are the bail
 discharged of
 their liability?

Court should pronounce that the bail are discharged of their liability, and are entitled to be dismissed from the effects of the monition of the 6th July,—not to be dismissed altogether; though, if discharged of their liability, they would be entitled to be dismissed altogether. This prayer is not very skilfully worded. Since, however, so much of the prayer as prays the Court to pronounce that the bail are discharged of their liability in substance necessarily opens the

whole case for the consideration of the Court, and as the whole question of liability has been argued at the bar, I will express my opinion as to whether or not they are discharged from the responsibility they incurred, and are, in fact, entitled to be dismissed.

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I shall now endeavour to state, with as much clearness as I can, the legal questions which appear to me to arise from the facts, or to have been discussed at the bar, and my view of them.

First, it is alleged, on behalf of the bail, that, by referring the amount of damage to private settlement, instead of going before the Registrar and Merchants, *time has been given* (that is a technical expression) to Mr. Gillies, the principal, and that, had the strict legal course been pursued, the damage might have been recovered from Mr. Gillies before he became insolvent. I will first inquire what is the legal meaning of "giving time," and the legal consequences of so doing.

I apprehend the true meaning of the expression, in the many cases in which it is used, is this: that if a man be a surety for another for a sum payable at a given time, and the creditor, or person to whom the money is due, extends the credit beyond the term originally agreed upon, and this without the knowledge and consent of the bail or surety, the so doing is "giving time," and the legal consequence is, that the surety is exonerated, upon this plain principle, that he became surety for the performance of a given contract, and for that only, and that he cannot be made responsible for the breach of another and a different contract: for an altered contract is another contract. I arrive at this conclusion not only by considering the cases cited at bar, but a vast number of other cases, many of which are collected in Mr. Theobald's work:* it would be a waste of time to expend it in citing any of those cases.

Meaning of term.

Legal consequence of giving time—surety exonerated.

Assuming this to be the true principle as to "giving time," although it may be possible that the principle on which that doctrine of law is provided may be applicable to the present case, yet it appears to me that the rule, such as I be-

* *Law of Principal and Surety*, c. v. p. 114.

FEB. 17. lieve it to be, cannot be directly applied to the question before me, for this reason : there is no precise time specified in the obligation entered into by the bail when the damages were to be paid ; and therefore I do not think it can, in strictness, be said that the agreement to settle the amount of damage out of Court was a "giving time," in the legal sense in which it is used.

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Rule not applicable here, as no precise time specified in obligation.

For the sake of stating my opinion as clearly as I can, I will also refer to another rule, equally, as I apprehend, well settled. If the owner of the *Woodpark* had merely delayed following up the reference to the Registrar and Merchants, such delay alone would not have exonerated the bail ; for forbearance, or mere neglect to move onwards, does not relieve the sureties from their obligation. This was the principle acted upon by Lord Stowell in the case of the "*Vreede*," and is, as I conceive, the result of all the cases.

This not a case of mere forbearance or neglect ; something has been done. The circumstances of this case, however, do not allow me to dispose of it under this rule ; for it is not a case of mere forbearance ; it is not a case of passive neglect ; something has been done, and it is the nature and effect of the acts done which I must now consider more minutely.

What ?

Agreement to settle amount of damage out of Court without informing the bail.

Now, always bearing in mind the tenor and effect of the obligation, let me state what the party suing has done. The fair effect of the Act on Petition, the averments and the admissions, is, that Mr. Whitehead agreed to settle the amount of damage out of Court ; that such negotiation was not communicated to the bail ; that, after one of the bail was informed of the fact by letter, requesting him to accept the bills, the Proctor for Mr. Whitehead alleged, in Acts of Court, that the damage amounted to £360, and the Proctor for Mr. Gillies admitted it ; then a monition was prayed by the former, and the mode of payment agreed upon was, by bills at certain dates, to be signed by one of the bail (not by both) as well as the principal. The bearing of these facts on the obligation entered into by the bail is the matter for consideration.

I cannot import into a legal view of this case other circumstances set forth in the proceedings, for I must decide the question on principle, and on principle only ; therefore,

Question must be decided on principle, with-

I do not and cannot notice whether, in this particular instance, it was convenient to settle the amount of damage in the North, because the ship damaged might have lain there, and the parties were there resident; nor whether Gillies was insolvent at this or that time. However these facts may be, I am of opinion that they ought not to influence my decision, which must be governed by general principles, and not by the accidental circumstances of any particular case. That I ought to decline importing into the case these special circumstances, is, I think, manifest; for, were it otherwise, the liability of bail might depend upon whether the facts shewed a convenience more or less in settling the amount of damage by private agreement; or upon a still more difficult question, the time when a man became insolvent. As an authority for thus excluding such circumstances from my consideration, I need only refer to the decision of Lord Rosslyn, in *Rees v. Berrington*.*

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out reference to
accidental or
special circum-
stances.

In order to assist my judgment, I have looked through a great many decisions, both at law and in equity, relating to release of sureties; but as the form of the obligation in all these cases differs from the obligation by which bail are bound in this Court, I could not expect to find, and have not found, any which precisely resembles, or directly bears upon, the present question. But I have endeavoured, both by reflexion and by consideration of these judgments, to extract the true principle which ought to decide this case, and that I take to depend upon the following proposition:—Has the conduct of Mr. Whitehead in any way altered or affected the obligation, so that any prejudice might have attached upon the bail? I say “might,” for I am well satisfied that I ought not to inquire whether they actually have sustained prejudice; but whether prejudice might by possibility have ensued. Should it turn out to be the fact, that what was done by Mr. Whitehead might by possibility have prejudiced the bail, they will be discharged. And, perhaps, I have put the proposition rather too strongly against the bail, for some of the authorities would go to shew, that if the principal make any alteration in the contract as it originally stood, or

The principle upon which this case depends.

If the bail might have been prejudiced, they are discharged.

* 2 Ves. jun. 540.

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Bowmaker v.
Moore.

even in the mode of executing it, the responsibility of the bail is at an end. *Whitcher v. Hall*;* *Eyre v. Bartrop*;† *Bowmaker v. Moore*;‡ *Archer v. Hale*.§ The case of *Bowmaker v. Moore* appears to me to have a more immediate application to the present case. It was decided, after great deliberation, in the first instance by Lord Chief Baron Thompson,|| and secondly by Lord Chief Baron Richards (though it does not so appear in the report in Price), and with the more consideration because the Court of Common Pleas had held that the sureties were not discharged. It differed from ordinary cases of bail, for it was a case of surety in a replevin-bond. In ordinary cases of bail, the bail may interpose in the action, and surrender their principal; but not so in replevin. The replevin-bond, too, more nearly approaches the present case, in that it is a substitute for the goods seized under a distress, as bail is, in the Court of Admiralty, for the ship arrested. The bond in replevin is conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods and chattels distrained, in case a return should be awarded before any deliverance be made of the distress. The condition of the obligation in the Court of Admiralty necessarily differs, for, in replevin, the bond is for the plaintiff to *prosecute*; in the Court of Admiralty, the obligation is upon the party to *defend*: but in substance they agree thus far, that both are in lieu of the things seized, and to make good the loss in certain results. They resemble each other in another most important particular, that bail in the Court of Admiralty, no more than sureties in replevin, can interfere at all in the suit. The effect of the decision in *Bowmaker v. Moore* is, that the agreement between the parties might possibly have been prejudicial to the sureties; that, therefore, from the time of the agreement, the sureties were discharged, and that, being discharged, nothing done afterwards could call into new existence their liability once extinct.

Application
of its doctrine
to the present
case.

Now does this rule and doctrine apply to the present

* 5 B. and C. 269. S. C. 8 Dowl. and Ryl. 22.

† 3 Madd. 221.

‡ 3 Price, 214, and 7 Price, 223.

§ 4 Bing. 464. S. C. 1 Moore and P. 285.

|| 6 Taunt. 379.

case? Here is an agreement to settle the amount of the damages out of the Registry—in truth out of Court—and the payment to be made by bills of exchange. I do not stop to inquire whether such an agreement, in that stage of the proceedings, was a binding agreement between Mr. Whitehead and Mr. Gillies, though I see no reason to doubt it; for as to the amount of the damages, it was consummated by the proceedings subsequently had in this Court. If there was any doubt as to its being a binding agreement, the Proctor for Mr. Whitehead comes into Court on the 6th July, and alleges the amount of damages to be the very amount agreed upon, and that is admitted by the Proctor for the party proceeded against. I am of opinion that, by this proceeding, Mr. Whitehead and Mr. Gillies are both estopped from carrying out the decree of the Court, referring the amount of damages to the Registrar and Merchants; for it would be absurd, on the face of it, for the Proctors of both parties to come before the Court, and say there was no dispute as to the amount of damages, and then ask to refer that which was not disputed to the Registrar and Merchants. Then, are not these proceedings a deviation from the original contract by which the sureties were bound, and might not the assessment of the damages by private agreement be prejudicial to the sureties? I apprehend there can be no dispute, that the original contract was, that the damages should be those adjudicated by the Court, and that the damages agreed upon by the parties were not adjudicated by the Court. That this arrangement might be prejudicial to the sureties, is clear; they were entitled to an examination of the accounts before the Registrar and Merchants. On both points, therefore, the answer must be in the affirmative.

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There has been a deviation from the original contract, and the sureties might have been prejudiced.

But, then, it is stated in the Act on Petition, that the sureties are entitled to a reference to the Registrar and Merchants. Now, first, I think this averment is not founded in law. The sureties were no parties to the original suit; they were not entitled to interfere in any stage of it; the conduct of the suit, as relates to the defence, must rest with the party principal; if bail could interfere, it would lead to the utmost

FEB. 17. confusion in the conduct of a suit. But, secondly, supposing
The Harriett. that the practice of the Court did not prevent such interference, then was not the liability of the sureties extinguished

Their liability on the 6th of July? I think it was extinguished by the acts of Messrs. Whitehead and Gillies, and that the transactions between them, coupled with the acts done in Court, at the very moment, discharged the sureties from their responsibility; and if so, all the authorities shew that it cannot be revived. Even if the proceedings which have taken place in this Court, as to the negotiation and agreement, could be cancelled altogether, and all that was done in Acts of Court, I am of opinion that it could not have the retrospective effect of reviving the responsibility of the bail, which was, *ipso facto*, at an end on the 6th of July. I therefore think, upon a review of all the facts and circumstances, that I am bound to pronounce that the bail are discharged from their liability.

Bail discharged.

Costs.

With respect to costs, I think, considering what we have had to go through in ascertaining the law, and the many difficulties with which the case is surrounded, and that we have so very few cases of the kind, I should go too far if I were to give the sureties their costs.

Proctors:—*Engleheart*, for the Plaintiff; *Deacon*, for the bail.

Salvage. — **THE "ZEPHYRUS."**—*Act on Petition.*—In this case an action was entered against the vessel, in a cause of salvage, in the sum of £100, and bail taken. The Act on Petition on the part of the salvors alleged that, on the 18th of November, the vessel (a brig) was observed from Yarmouth beach, with a signal of distress flying, and in very considerable danger; that the lives of the persons on board were in great peril; and that they launched the life-boat, and made an unsuccessful attempt to render assistance to the vessel itself, but, on a second attempt, their exertions to save the lives of those on board were successful, and they were enabled to land the crew in safety on the coast of Yarmouth; and the Act concluded by praying, that the Court would decree such a sum to be paid to the parties as it should see fit, for their attempt to save the lives of the master and of

An unsuccessful attempt to save the ship and cargo; a second successful attempt to preserve the lives of the crew; can found no claim for salvage reward, which is given as a consideration for a benefit *actually* rendered to the property.

the crew of the vessel. The facts were not denied by the owners. FEB. 17.

Haggard, D., for the salvors. In the first instance, the boat was launched with the view of salving the ship; this consideration may enable the Court, in its equitable jurisdiction, to allot a salvage reward, the salvors having saved the lives of the master and crew. Cited the "*Queen Mab*."* *The Zephyrus.*
ARGUMENT.

Addams, D., for the owners. So far from granting these persons a salvage reward, they should be condemned in the costs. They were offered £35. There is no precedent for such a demand, and the Court has no power to grant a reward for the mere preservation of human life. In many cases, where lives were saved, the whole property might be lost. Cited the "*Aid*."†

DR. LUSHINGTON.—I will, in the first instance, consider JUDGMENT. whether this claim is well founded in law, with reference to the general principles of this Court, without directly importing into my consideration the statute 1 & 2 Geo. 4, c. 75.

I apprehend that, with regard to any attempt to save the vessel and cargo, however meritorious, or whatever degree of danger or risk of life may be incurred, if it is unsuccessful, it never can be considered in this Court as laying any claim, right, or title, to a salvage reward; and for this obvious reason: a salvage reward is given for a benefit actually conferred, and not for a benefit attempted to be rendered. It appears, therefore, extremely difficult, in this case, to attribute any weight to an unsuccessful attempt made to salve the ship and cargo; for if that was a nullity, it could add in no degree to the weight of the other service. A salvage reward is given for a benefit actually conferred.

I next proceed to consider the demand for a successful attempt to rescue the lives of the master and crew who were on board the vessel. Let us, in the first instance, consider how such a demand, without reference to the statute, can be maintained in the Court of Admiralty. The foundation of the jurisdiction of this Court is, that it is a proceeding against the property itself. Now, on what principle the property of the owners can be answerable for a service rendered to the saving of life, I find it extremely difficult to con- The property cannot be answerable for a service rendered to life.

* 3 Hagg. A. R. 242.

† 1 Hagg. A. R. 84.

FEB. 17. *The Zephyrus.* ceive. I have always understood, upon the authority of Lord Stowell, that it is a rule that no person could come to the Court of Admiralty for a salvage reward merely on account of saving the lives of individuals ; and this proposition was so firmly fixed in my mind, and I was so imbued with the principle, that I never looked into authorities. But when I observed the averments contained in this Act on Petition, I thought it my duty then to bestow some consideration upon the question.

The statute. I am of opinion that, unless jurisdiction is given to this Court by the statute, it has no power or authority to decree any salvage reward in such a case. I assume that the words introduced into the Act of Parliament have been for the first time introduced into any Act : " Or being instrumental in the saving the life or lives of a person or persons on board the ship or vessel." But the whole of this section refers, not to what is to be done by the Court of Admiralty, but it is solely to give additional power and authority to persons at the outports to award salvage. Whether it gives authority to magistrates or to the Commissioners of the Cinque Ports to entertain questions of this nature, it is unnecessary for me to determine. The only question which I have to decide is, whether it applies to the jurisdiction and power of this Court.

The "Queen Mab." Before I consider this point, I will refer to the case of the "Queen Mab." In that case, it is evident that the *Beulah* rendered no assistance whatever to the property of any salvage character, but she did rescue the lives of the master and crew of the *Queen Mab* ; and the Act on Petition, as a ground for supporting the claim of the *Beulah*, expressly referred to this section in the Act of Parliament. I therefore take it for granted, that all the circumstances were under the consideration of the learned Judge who decided that case, who, after stating that the *Unity* and the *Ranger* in strictness were to be considered as the only salvors, without any reference to the Act of Parliament, allotted £30 to the *Beulah*, for the assistance she had rendered in the preservation of the lives of the crew. I think it difficult to find any great distinction between the two cases ; for I cannot

see any sound distinction between the case of a vessel salvaged by one set of salvors, and the crew by another; and a case in which the crew were rescued, and no assistance whatever was rendered to the vessel. It appears to me that the merits of the salvors stand on the same footing in both cases; and I am bound to say, that the facts of this case are very nearly the same as those of the "*Queen Mab*," and the judgment of Sir John Nicholl was founded on the statement of facts in that case. But there is another consideration; the vessel in that case was a derelict, and Sir John Nicholl never supposed that any serious objection would be raised by her owners to a remuneration being given to the *Beulah*, and the persons who manned her, and I should be doing an injustice to Sir John Nicholl, if I were to suppose that he intended this as a deliberate and binding decision. With regard to my own opinion, in the first place, when I look to the Act of Parliament—and without it the Court could not administer any relief at all—I should have expected to find some words expressly conferring upon the Court authority which it had not by the previous law. How can I come to any such conclusion from a statute which simply purports to confer certain additional powers—and defines these powers—solely on the Commissioners of the Cinque Ports, and on justices of the peace? If it confers such jurisdiction on them, it cannot directly—though it might incidentally, by way of appeal—confer such jurisdiction upon the Court of Admiralty. My opinion is, that no additional authority has been conferred upon me which the Court was not in possession of before the passing of the Act; and I am bound, therefore, to reject the claim of the salvors—certainly not with costs. When I look to the case of the "*Queen Mab*," and to the very meritorious exertions made in this case to save life, I shall certainly not condemn the salvors in the costs; but, so far as my own opinion goes, this is to be considered now as a settled question.

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The Zephyrus.

No additional authority conferred upon this Court by the statute.

Claim rejected.

Proctors:—*F. Dyke*, for the salvors; *Blake*, for the owners.

Judicial Committee of the Privy Council.

FEBRUARY 19.

Capacity.—A will made by an unmarried testator, of weakened capacity, largely benefiting a stranger in blood, in whose care he had placed himself, to the prejudice of his next of kin, and contrary to his intention expressed in a prior will,—the evidence as to capacity and influence being conflicting, and that of the drawer of the will being open to suspicion,—pronounced for the sentence of the Court below being thereby affirmed.

DEARE AND MAYHEW v. ELWYN.—*Appeal.*—*Definitive Sentence.*—This was an appeal from a sentence of the Prerogative Court of Canterbury,* admitting to probate the will of Mr. Peter Rainier, who died, 30th October, 1837, a bachelor, leaving personal property value about £52,000, and a real estate worth about £1,100. The next of kin and heir at law was Mrs. McQueen, daughter of a deceased brother of the testator. The will in question, which was dated 17th September, 1837, bequeathed the bulk of the property to Mrs. Elwyn, wife of Dr. Elwyn (an early friend of the testator, and with whom he resided during the latter part of his life), and nominated that lady sole executrix, thereby revoking a will of 1836, in which Mrs. McQueen, besides other benefit, was named residuary legatee. The later will was opposed by the executors of the will of 1836, on the ground of incapacity.

Sir John Dodson, Q. A., and Sir T. Wilde, Q. C., for the Appellants; Sir W. W. Follett, S. G., and Addams, D., for the Respondent.†

* A report of this sentence is given in 6 *Monthly Law Mag.*, 29, q. v. for the facts of the case.

† In the course of the argument (December 20), a discussion arose respecting the non-production of the book or books of Mr. Ganning, the drawer of the will. *Sir T. Wilde* said: "Mr. Ganning has destroyed the drafts that contained his instructions, and he professes to answer our interrogatories from the entries in his books. These entries, however, are most unlike those with which persons familiar with the books of attornies are acquainted. It is not here a lease, there a partnership, next a consultation, then instructions for a will; but it is this transaction in its successive stages that forms the various items of these entries. These entries, we are told, have been extracted from the books, and he professes to give, not a faithful copy of the books, but an accurate statement of the entries only, which the examiner has verified. In a case like this, however, in which every thing depends on these entries, we were entitled to an inspection of the books; we had a right to see, not what the entries contained merely, but how the entries were made, and whether the book itself bore out the conclusions which he professed to derive from it, he being a person of such a singularly imperfect

LORD BROUGHAM.—The validity of this will has become, unavoidably, from the peculiar circumstances attending its execution, as well as from the previous condition of the testator, the subject of great contention here and in the Court below. The opposition to its validity is not rested upon the ground that the deceased was intestable: perhaps this never was the ground taken by the Appellants, and they may only have pleaded the imbecility as shewing Mr. Rainer to have been under the influence of Mrs. Elwyn; but their Allegation certainly avers, that he was sunk "into a state of complete imbecility, approaching to idiocy, and that he was quite incompetent to transact any business, or do any act of a serious import, requiring thought, judgment, and reflection;" as well as that he was under the power and control of the Elwyns. The case is, however, in this Court, rested upon the ground, not that he was intestable, but only that his faculties were greatly impaired; that he was reduced to a state of great mental weakness;

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Deare v. Elwyn,

JUDGMENT.

Not contended that the deceased was intestable.

Appellant's plea, imbecility,

and control.

imperfect memory. We called for that book at the commencement of the proceedings; it was always coming, but it never came; and now we are to take Mr. Ganning's deductions for granted, because he has shewn it to the examiner, who could not know what we might make of it; and, having been shewn, it was at once withdrawn. This affected, not our proceedings merely, but the judgment of the Court below; for how could that Court determine the value due to those entries without seeing them, and comparing them with the other entries in the book, to ascertain whether there was in it and them internal evidence that they were what they purported to be? All our applications were fruitless, and without any inspection of the book by us or the learned Judge, a decree was pronounced."

Here a desultory conversation ensued. *Dr. Addams* protested that no demand for the book had been made, and that its production would have been irregular. The *Queen's Advocate* declared that the production of the book had been called for. *Lord Brougham* asked whether the Ecclesiastical Court had a right to impound such a book; to which a hesitating answer was given, to the effect that it had not. At length, *Lord Brougham* said: "If you called for the production of the book, it should have been produced for your inspection, and you were entitled to a monition for its production."

This *interloquitur* does not seem to stand with the decision of the Judge of the Prerogative Court, in *Godrich v. Jones*. See *ante*, p. 4.

Feb. 19. that he was thus wholly incapable of resisting the importunity of those about him ; that he had fallen entirely under their influence, and become, as it were, a mere instrument in their hands, and that this will is to be considered as theirs, rather than his. Nor can it be doubted, on the one hand, that a person who is barely testable, if left to himself, may be of such impaired strength of mind as renders him incapable of offering resistance to designing persons among whom he is thrown, any more than it can be denied, on the other hand, that not all kinds of influence acting on some degree of mental sluggishness, or even weakness, will suffice to displace a later will, provided there remain sufficient apprehension of the thing done, and there exist a purpose of doing it. From the nature of the subject, it is impossible we should approach more nearly to any general principle or rule ; of necessity, we are examining a question of degree, and of that question the particular circumstances in each instance must dispose.

In the present case, besides the doubt always incident to such inquiry, there is an additional embarrassment arising from the evidence by which the *factum* is proved ; for, had the professional man, who prepared the will and presided over its execution, been a witness above all suspicion—nay, had his testimony not been in some material particulars at variance with itself—it would have been impossible to impeach the transaction by even a much greater weight of evidence than has been brought to bear against it. But the nature of his depositions, perhaps, too, his communications with the party chiefly benefited by the will, the near connection of that party with one of the other subscribing witnesses, her intimacy with the other, when taken together with the enfeebled state of the testator and his habits of dependence upon her and her family, for a considerable time previous to his decease, all tend to load the case with suspicion, even if no account be taken of circumstances connected with the general conduct of the parties, and call upon this Court, as they called upon the Court below, to exercise a jealous watchfulness over the proofs by which the proposition is sought to be established, that Mr. Rainier was dis-

Principle applicable to cases of influence acting on weakened capacity.

Defective evidence of *factum*.

Case attended with suspicious circumstances.

tinctly aware of the act which he performed, and that his mind intended to make this will. FEB. 19.

It becomes necessary, then, first of all, to examine the state into which his mental faculties are alleged to have fallen. We are to see what proof is afforded of his mind *Deare v. Elwyn.*
State of deceased's faculties.

having been so entire as to make him an unfit instrument for working the purpose of designing parties; and upon this point we have evidence from persons of three different descriptions:—those produced by the Appellants to impeach the will; those produced to support it by Mrs. Elwyn, but unconnected with her; and those more or less connected with her, and whom, having used them as her accomplices in the fraud alleged to have been practised upon Mr. Rainier, she now uses as her witnesses in support of the transaction. Evidence of three kinds.

In the first class is Mr. T. N. Elwyn, a cousin of Dr. Elwyn. His evidence shews that he is on rather bad terms with the Respondent, and that he is prepossessed against her conduct in relation to this cause. But he proves that the testator's faculties were entire down to the period of his quitting England in June, 1836. He was then more irritable than formerly, and declined the trouble of housekeeping; but his mind was unimpaired. Being a medical man, Mr. Elwyn attended Mr. Rainier professionally. When he returned in October, 1837, the same witness saw him, and describes him as then "in a perfect state of fatuity and childishness." Yet, on his cross-examination, he admits that Mr. Rainier sufficiently understood what was said to him; that he at once recognized and named a gentleman whom he had not seen for some time, and that he apparently understood a letter read to him in order to interest and amuse him. This was only a fortnight before his decease, and nearly two months after the will was executed. Witnesses against the will.
— Friends of the deceased.

Mr. Capel saw him after he had been two months at Boulogne, and found him in the same possession of his faculties as he had always been since he had known him, and that was for twenty years. A year after, and within four weeks of the execution of the will, he again saw him, and found his bodily infirmity much increased, but he had no opportunity of judging how far his mind had suffered, only he knew

FEB. 19. him (Mr. Capel) at once, spoke articulately, and inquired after Mrs. Capel. That Mr. Capel could have formed no opinion against his capacity is plain from this—that he will not positively swear he had not said Mr. Rainier was as capable of making a will as himself.

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This evidence of Messrs. Elwyn and Capel is the more material, because they are the only persons of respectable condition, with the exception of the physicians, whom the Appellants have produced, and because, if they are believed, especially Mr. Capel, it is quite impossible that the three or four nurses examined should have given either a true account, or any thing like a true account, of this unfortunate gentleman's state of mind. But, indeed, except that Mr. Capel speaks of a vacant stare, in some corroboration of Dr. McLoughlin's account, it is difficult to reconcile the highly-charged picture of imbecility given by the latter, and by Dr. Allatt, with Mr. Capel's more guarded statement.

And here, while commenting upon the more respectable witnesses produced by the Appellants, it is fit to remark, that there must have been others capable of speaking to the testator's condition during the whole of his residence at Boulogne. Indeed, after he quitted England, Mr. T. N. Elwyn and Mr. Capel are the only friends of the testator whom the Appellants have produced. Friends of his have been examined for the will, none against it, except these two, and their testimony, as far as it goes, is in favour of his capacity. There is no reason at all to believe that any person was denied access to the testator, either while he was at Boulogne, or after his return to England; on the contrary, it is in evidence that many persons, including the Appellants, had sufficient opportunities of seeing him to the last.

The nurses.

The evidence of one of the nurses, Wylde, is still more in contradiction to that of the other three than the testimony of Mr. Capel, as regards the alleged imbecility, and she explains clearly, and by explaining contradicts, all their statements about his delusions. The imbecility, amounting to idiotcy, of which they speak, and which one of them (Humphreys) describes as so complete, that you might as well

read to a table as to him, is wholly negatived by Wylde, who attended him from July to the middle of October, 1837. Besides swearing that he was never at any time in a state approaching to idiotcy, she represents him as conversing with her rationally on the subject of his infirmities, and as so fond of being read to, that he was read to for hours together. But she describes him as violently affected with laudanum, whenever it was administered to him, and the paroxysms into which it flung him are clearly those to which the accounts given by the other nurses refer. Wylde appears to have quarrelled with Mrs. Elwyn, who discharged her in anger, and in some parts of her evidence she betrays a considerable degree of ill-will towards her former mistress in particular, though she admits Mrs. Elwyn's "apparently anxious and endearing attentions to Mr. Rainier," in answer to an interrogatory; yet she qualifies the admission by expressing her doubts of that kindness being real. There appears then no reason for suspecting that the Appellants have fallen upon a hostile witness, and called a friend of the Respondent, in producing Jane Wylde.

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But if she is believed (and she had great opportunities of knowing the state of Mr. Rainier's mind at the very period of the *factum*), it is not only impossible to place any reliance upon the accounts given by the other three nurses, but it is also as difficult to believe that two of the three medical men, Drs. Allatt and McLoughlin, have not been misled by appearances, and confounded mental with bodily infirmity; or they have inaccurately recollected the case of this one patient; or, having had less opportunity of observation during their comparatively short interviews with him, they formed an opinion which would have been corrected by seeing him as constantly as the nurse did, who attended him for the last two months of his life.

The medical witnesses.

Dr. Comet, the third physician examined by the Appellants, does not certainly give the same account of Mr. Rainier's mental condition as the other two, and rather lessens than increases our confidence in the accuracy of their observations, or it may be in the correctness of their description of what they had observed. According to Dr. Comet, al-

Fza. 19. though Mr. Rainier seemed incapable "of sustaining a grave or serious conversation, requiring the action of the mental powers," it does not appear that he ever saw him tried in this respect; and although he was "slow of comprehension and feeble in his mind," he could "sustain conversation of a light kind," answering questions respecting his health. Dr. Comet saw him twice a day, an hour and a half each time, during six weeks, and he distinctly states, "I never witnessed in him what I should term imbecility or childishness." Although he gives an opinion that "he could not have resisted control or undue influence," he expressly says, "he was not treated as an infant;" and that when he yielded to those about him, "it was altogether in the way of affection and persuasion," and under no compulsion. The matters on which he thus yielded were comparatively unimportant; they regarded his treatment, and were more or less connected with his heavy bodily affliction. Dr. Comet sums up his statement by saying that, in his belief, he was incapable of exercising thought and judgment on a serious matter, and was in a state rendering him easily imposed on, from bodily and mental weakness. This is the opinion which Dr. Comet formed without having seen any attempt made either to try his judgment or impose upon his will. But, in continuation of this summary, he asserts, as a fact of which he has no doubt, that he was not imbecile; that a stranger coming in and seeing him would have termed him such, but it was not so; that he answered all questions properly, though slowly; apprehended what was said to him, though slowly; was unable to endure long conversation, or any thing requiring exertion, but only through physical, not mental, weakness; and that though his mind, to a certain extent, partook of his bodily infirmity, he always answered and thought correctly. To this must be added the fact, of the materiality of which Dr. Comet says he was aware, that Mr. Rainier's capacity, when he spoke in French, appeared to less advantage than when he used his mother-tongue. The whole evidence of this witness is given in a manner to gain confidence. There is in it an absence of all exaggeration, and an appearance of careful observation. It seems to be

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given more deliberately, and with more discrimination, than either Dr. McLoughlin's or Dr. Allatt's; but if we rely more upon it than upon theirs, we shall be unable to believe that theirs gives the correct account of Mr. Rainier's capacity. "His articulation was affected," says Dr. Comet, "but less so when he spoke English." Dr. McLoughlin says, "he had the greatest difficulty in bringing out a word." The nurse Wylde's account of his articulation, three months later, is equally inconsistent with this, and Mr. Capel says that, in August, 1837, his speech was not affected, and that he articulated perfectly. He was not imbecile, Dr. Comet says; his answers to all questions were proper; his weakness was more bodily than mental; he always thought correctly. "I considered him," says Dr. McLoughlin, "in a state near to complete imbecility and childishness, and quite incapable of judgment and reflection, from want of mental powers, and not merely from bodily weakness. His intellect was weak and impaired to the extent of his being in a childish state; nay, you could tell by his look that his brain was affected, without speaking to him." But Dr. Comet says distinctly that he did not consider his brain as affected, after seeing him three hours a day during six weeks, and the whole evidence in the cause supports this more cautious and discriminating opinion.

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Dr. Allatt is not, perhaps, so much in opposition to Dr. Comet as Dr. McLoughlin, for he says that Mr. Rainier, in March and April, 1837, was not in a state approaching to idiocy, and that he could speak and answer "Yes" and "No;" but still his testimony cannot be reconciled with that of the French physician, for he describes him as incapable of answering, and as in a state of mental imbecility. Now, not only were Dr. Comet's opportunities of observation very much more ample than Dr. Allatt's, but the latter must needs have formed a very different opinion of the testator's capacity at the time, else he surely would not have spoken to him as he did upon taking shares in a speculation in which he himself was concerned, recommending it as a promising undertaking, and then asked Mrs. Elwyn to make him take the shares, which was done accordingly. It may

FRA. 19. be further noted, as somewhat of a refinement, if not an inconsistency, in one who is describing Mr. Rainier's faculties as gone, that he should lend him a book written in old French (P. De Comines), as a curiosity, and should give as a reason, and with a view to reconcile this with his opinion of utter incapacity, that Mr. Rainier liked to have his faculties supposed less impaired than they were. Dr. Allatt plainly did not when he lent him the book, probably did not when he recommended the speculation, consider Mr. Rainier's mental condition by any means so low as he now thinks and deposes that he did.

The servant. The last witness examined by the Appellants, to whom it is necessary that I should advert, is Leduc, the servant who attended on Mr. Rainier's person for the last five months of his life. His evidence is wholly inconsistent with the supposition of incapacity. He used to read to him a great deal, or hold the book for him to read, and mentions the kind of remarks which used to fall from him, both at those times and others during his constant attendance.

Result of evidence against the will. In considering the testimony of the witnesses produced by the Appellants against the will, all of them unconnected with the Elwyns—unless it be that Leduc may have been hired by them, and that Mr. T. N. Elwyn is their kinsman, but kinsman

Fails to shew the mind of testator greatly impaired. “a little less than kind”—we have in fact gone through the bulk of the case against the will; for if the evidence thus adduced has failed to shew that the mind of the testator was so far gone as to make him a mere instrument in the hands of others, it follows that the circumstances attending the execution of the will have raised only a suspicion, which rests on suggestion, and is unsupported by direct evidence. The account given by Mr. Ganning may be suspicious from the contradictions in those parts of his statement which are not founded on an argumentative recollection; the connection of the other subscribed witnesses with Mrs. Elwyn may add to these suspicions; a conjecture may enter the mind that the whole was a conspiracy; a supposition may be formed that the will signed by Mr. Rainier was put upon him, either by making him adopt an instrument without knowledge of its contents, or by substituting for his signa-

ture a paper different from the one read over, there being only Mr. Ganning's evidence to the instructions and to the reading. All this may be fancied, as possible; and yet all will fail to warrant our concluding that it was true, unless the mental condition of Mr. Rainier be proved such as to facilitate the execution of that scheme. We need not lay down any general rule as to the party on whom the proof lies in such cases, for here there is distinct evidence of the *factum*, which throws it upon the party impugning the transaction to shew that there was a conspiracy between Mr. Ganning and Mrs. Elwyn, either with or without the accession of Miss Rees or Mr. Dickenson; and no suspicion arising from the examination of Mr. Ganning, or from the family connection of the other two witnesses, will be sufficient to prove this, unless Mr. Rainier's mind be shewn to have sunk into a state approaching to childishness. This proof being upon the Appellants, and their witnesses failing to support it, we are the less required to go minutely into the testimony of the two other classes of witnesses, those produced by the Respondent, though unconnected with her, and those produced by her who are so connected.

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The suspicious circumstances of little force in the absence of such proof.

The *onus* of proof.

Its failure.

But yet it is impossible to pass over the important testimony which both these classes of witnesses have borne to the testator's capacity, and to his recognition of at least some will after it was executed, and a will very favourable to Mrs. Elwyn. It will be sufficient to mention five, none of whom can be said to stand in any relation to Mrs. Elwyn which can affect their credit, by giving them even a bias in the cause.

Witnesses in support of the will.

Mr. Dearn had known the Elwyns for several years, having become acquainted with them at Paris in 1829-30, and called on them as he passed through Boulogne, where he saw Mr. Rainier for the first time in the spring of 1837, and recommended his going to Paris in consequence of the benefit he had himself received from Dr. Comet's treatment, and he saw Mr. Rainier frequently at Paris. It is very possible that the estimate he formed of his strength of mind is too high, or that he states it too strongly; but he gives so many details in proof of his mental capacity being entire,

FEB. 19. notwithstanding his bodily infirmities, that we are under the necessity of believing him to have sworn falsely, if the opinion given, not the facts sworn to, by Dr. McLoughlin, be well founded. That opinion of Dr. McLoughlin can by no possibility stand with the particular facts distinctly sworn to by Mr. Dearn, and it does not seem reasonable to expect that any Court should embrace this alternative, especially after the discrepancy already pointed out between the opinion of Dr. McLoughlin and the opinion, together with the testimony to facts, of Dr. Comet.

Mr. Ledigue only became acquainted with the Elwyns during their residence in Paris with Mr. Rainier, and he did not see the latter till their return to Boulogne. He gives an account of his conversation upon ordinary topics as being perfectly rational and sensible in every respect down to the time of his embarkation, after the execution of the will, although his infirmities were such as to prevent him from talking much, and he never heard him discuss difficult subjects. The first time he was at a party at Dr. Elwyn's, at Boulogne, there were twenty or thirty persons present, and Mr. Rainier continued in company as late as eleven o'clock. This is one of the many proofs that he was not kept concealed from society, and that many others, besides those witnesses produced against the will, might have been examined touching his mental condition.

The testator
not concealed
from society.

Mr. Muldoon had known the Elwyns since 1831, but was not on very intimate terms, though well acquainted with them both. He had been educated for the medical profession, and having been acquainted with Mr. Rainier in London, the year he went out to Boulogne, and afterwards seen him both at Paris, in the spring of 1837, and at Boulogne in August, he says that his conversation was always rational and sensible, and that, comparing his state since he first became acquainted with him, and his condition in August, 1837, the month before the *factum*, "he perceived great bodily change, but mentally he observed none." Now the witnesses against the will join in representing his mental faculties as unimpaired when he left England.

But, perhaps, the evidence of Mr. and Mrs. Braucher

affords the most satisfactory confirmation of the view which a consideration of the case against the testator's capacity has led us to form in its favour. They were not only unconnected with the Elwyns, but had a somewhat close connection with the family of the testator, with whom they were well acquainted. Neither had any acquaintance with the Elwyns in August, 1837, and at the end of that month, three weeks before the will was executed, they saw him for about half an hour; and though they report him as extremely infirm and helpless in body, they describe him as perfectly understanding all that was said to him; recognizing all the persons spoken of; giving reasonable and proper replies whenever he spoke; and being in all respects rational and sensible. If much occasion was not given for trying the strength of his understanding, at least it is plain, that nothing appeared to excite the least suspicion in the minds of this respectable couple, among the ancient friends of the family, that Mr. Rainier had fallen into a state of imbecility, which exposed him to the arts of those around him; and although, finding him under the care of persons who were to them entire strangers, in so helpless a state, was certainly calculated to excite suspicions of undue practices, those suspicions were either excluded by what presented itself to them on their visit; or, if they had been at first raised, were on that occasion removed. Once more, it may be observed, how hard it is to reconcile with the circumstances noticed by Mrs. Brauncher, at the end of August, the opinion so roundly asserted to have been formed by Dr. McLoughlin and Dr. Allatt nearly half a year before.

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Upon the whole, therefore, it appears that Mr. Rainier was not in such a state of mind as made it possible for Mrs. Elwyn and Mr. Ganning to make a will for him, and obtain his signature, supposing them capable of forming such a design. But this is the case of the Appellants, if Mr. Ganning's evidence is disbelieved; unless we take a portion of it, which relates to the instructions as given by the deceased, and ascribe those instructions to the overruling and controlling influence exercised by Mrs. Elwyn over his enfeebled understanding and his exhausted powers of resist-

The testator not in such a state as to be made an instrument of fraud.

FEB. 19. **ance.** But, then, if we believe he gave these instructions, we must also believe he did so aware of their nature, and conscious that he was disposing of his property in her favour; and if so, no influence which she may have gained over him by making herself useful, nay, necessary to his existence, or by ingratiating herself through any attractions

Deare v. Elwyn. which she might possess, or by constantly watching his inclinations, or even turning his weaknesses to her account, would be sufficient to displace a will made under the influence of such appliances, provided there existed the discerning understanding and the willing mind.

Influence not sufficient to displace a will made by a competent testator. It is never to be lost sight of, in this case, that the probabilities were by no means against some such disposition of his property having been consistent with his ultimate intentions, even supposing the most perfect mental health to have continued on his part, and the most entire abstinence from interfering on the part of those about him. Dr. Elwyn was his oldest and most intimate friend, at school, at college, and in all his after-life—a connection enduring uninterruptedly for above half a century. His infirmities had thrown him upon the protection and support of Mrs. Elwyn to a degree of which there can hardly be found a second example. Accidental circumstances had separated him from all his own relations, towards only one of whom he had ever shewn at any time a particular regard, and that one had scarcely come near him, perhaps been unable to come near him, for many months, during which his health was quickly wearing away. At a time when no suspicion is pretended to have existed of his perfect capacity, his firm will,

Probabilities not against the disposition. and his uninfluenced disposition of his property, he had made a large gift in favour of the Elwyns. That he afterwards, as they became more essential to his existence, conceived an intention to alter this original disposition, is clearly proved; and though it is only shewn with this degree of clearness that he was minded to make *some* new will, it is in the highest degree improbable that the change should not have been in one direction, namely, to increase the amount of their former bequests.

A large benefit given to the Elwyns by the will of 1836. **Recognitions.** If the evidence of recognitions be held defective, as

such, on the ground of those declarations being by possibility applicable to another will than the one set up in this cause, at least, they can hardly apply to the original will, because it is proved that he intended to make some new one, and the declarations are connected with that new one, unless Mr. Dickenson, as well as Miss Rees, has sworn falsely; to say nothing of the subsequent declarations to the like effect sworn to by unconnected witnesses, who saw him immediately before his death. The probability, then, is, that he should have altered his will so as to increase his bounty towards Mrs. Elwyn; and the evidence is, that he intended to alter it, and believed he had altered it, most probably so as to execute that probable intention.

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It is in these circumstances that the will, sworn to have been executed by him after he had given instructions for preparing it, comes before us, and it must be admitted that a consideration of them materially aids us in arriving at the conclusion which rejects alike the hypotheses of conspiracy and of overruling influence or control: for sustaining either of which hypotheses, a far more impaired mind than is proved, even by the case against the will, to have existed, is a necessary foundation. Upon a careful consideration of the evidence, we have arrived at the conclusion to which the learned Judge in the Court below came, after a most able and elaborate examination of it—that whatever might appear suspicious or mysterious in the first instance, is, upon closer inspection, sufficiently cleared away, and that effect must be given to the will propounded by the Respondent.

Their lordships, therefore, pronounce against the appeal, affirm the decree appealed from, and remit the cause to the Prerogative Court; but their lordships do not consider that any costs ought to be given, either of the proceedings below, or in this Court.*

Decree of the
 Court below affirmed;

Proctors:—*Pitcher*, for the Appellants; *Smale*, for the Respondents.

* The Committee consisted of the Lord President, Lord Wynford, Lord Brougham, Lord Campbell, Mr. Justice Erskine, Dr. Lushington, and Sir A. Johnston.

FEB. 19.

HENFREY v. HENFREY.—Appeal.—Act on Petition.—This

Appeal.—The later of two testamentary papers, naming no executor, and not expressly revoking the prior will which contained an appointment of executors, held to be a substantive will, and to revoke, *ex necessitate*, the former and the appointment of executors.—Sentence of Prerogative Court affirmed.

was an appeal from the Prerogative Court of Canterbury, in a cause citing Mary Ann Henfrey, relict and administratrix, with will annexed, of Mr. Henry Henfrey deceased, to bring in the Letters of Administration granted by that Court, and to shew cause why they should not be revoked, and probate of the will of the deceased, contained in two testamentary papers dated respectively 14th July, 1838, and 26th February, 1839, granted to Charles Henfrey and Charles M. Stretton, the executors therein named; promoted by Charles Henfrey against Mary Ann Henfrey. The deceased was contingently entitled, under the will of his father, to certain property on attaining the age of 25, or marrying previously. He married under 25, but doubts being raised whether the marriage was valid, an arrangement was made between him and the trustees under his father's will that the property should be retained till he reached 25. In July, 1838, about a year after his marriage, he went to reside at Havre de Grace, in France, but just prior to leaving England, he executed a will, dated 14th July, 1838, whereby he bequeathed a moiety of £2,000, to which he was entitled in reversion, under his marriage-settlement, to his wife, together with his household furniture; and the residue of his estate and effects, including his contingent interest under his father's will, he bequeathed to his brother Charles, whom he appointed executor, with his brother-in-law, Charles M. Stretton. He continued to reside at Havre till his death, on the 27th February, 1839, on the day preceding which, he executed a testamentary paper in the following words:—

I here by Leave all I possess in this World to my Wife, Mary Ann Henfrey, Containing Household Furniture, Books, &c. I likewise wish to be paid to Miss Diana Maddox the sum of Five pounds, which money was borrowed for my use. this 26 day of February 1839.

This paper was attested by two witnesses, and executed in conformity to the Statute.

In the Court below, Mr. Henfrey alleged that, as the paper of 1839, whatever might be its effect as a testamentary dis-

position, did not appoint executors, or revoke the appointment of those named in the will of 1838, they were entitled to probate of both papers. On the part of the widow, it was alleged that the paper of 1839 was the last will of the deceased, who thereby intended to make, and did make, an entire disposition of his property, without reference to, or connection with, any other paper.

The Judge of the Court below (Sir Herbert Jenner) 1840.
held that the paper of 1839 was, on the face of it, a substantive will, not being a part of the former will nor a codicil to it: there could not be two substantive wills, and although the latter contained no express revocation of the former, it was a revocation of it *ex necessitate*, and consequently a revocation of the appointment of the executors.

Addams, D., for the Appellant; *Sir F. Pollock*, A. G., for the Respondent.

DR. LUSHINGTON delivered the judgment of their Lordships, pronouncing against the appeal, and affirming the sentence of the Court below.

Proctors:—*Blake* for the Appellant; *Cox* for the Respondent.

THE "DIANA."—*Appeal.—Act on Petition.*—This was an appeal from a judgment of the High Court of Admiralty, given in a cause of damage by collision, between the owners of two vessels, the *Diana* and the *Little Hampton*. The former, a West Indiaman, going up channel, the latter, a small schooner, working down, about nine in the morning of the 5th September, 1839, met between Broadstairs and Ramsgate, when the *Little Hampton*, being struck by the *Diana's* cutwater amidship, was sunk. The *Diana* was in charge of a licensed pilot, and the owners contended that if any blame were imputable to that vessel, the pilot was in fault, and they were exempted in such a case from responsibility under 6 Geo. 4, c. 125. On the part of the *Little Hampton*, it was alleged that the collision arose from a want of look-out on board the *Diana*, whose duty it was, by the rules of navigation, to have given way to the schooner, and that this neglect was not imputable to the pilot alone, the

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Henfrey v.
Henfrey.

1840.
June 6.

JUDGMENT.

Appeal.—In collision, the owner of the vessel doing the damage is not exempted from responsibility, under the Pilot Act, on the ground of a pilot being on board, unless the owner prove that the accident arose entirely and exclusively from the pilot's default. — Judgment of Admiralty Court affirmed.

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The Diana.

1840.
 Feb. 12.

crew being *in pari delicto*. The Trinity Masters, who assisted the Judge of the Admiralty Court, having been of opinion that the accident was attributable to the default of the pilot on board the *Diana*, and likewise to the neglect of the master and crew in not keeping a good look-out (the *Little Hampton* not being at all in fault), the Court held* that the owners of the *Diana* had not brought themselves within the exception provided by the Act, to do which it was necessary for them to prove that the accident arose entirely and exclusively from the default or incapacity of the pilot; that such exception must be construed strictly, and that, if the damage happen through the joint misconduct of the pilot and of the master and crew, the liability under the general law still attaches to the owners of the vessel doing the damage; for a pilot being on board a vessel, pursuant to the Act, does not discharge the master and crew from their proper responsibility, in respect to the management of the ship, the keeping a good look-out, as well as the execution of the pilot's orders.

JUDGMENT.

THEIR LORDSHIPS pronounced against the appeal, affirming the judgment of the Court below, with costs.

Proctors:—*Addams* for the Appellants; *Pott* for the Respondent.

1842.
 April 25.

In the Court below, an action had been commenced by the owners of the cargo on board the *Little Hampton*, which, after the Act on Petition had been brought in, was stayed till the action by the owners of the ship had been decided; the former then claimed their costs.

JUDGMENT.

DR. LUSHINGTON.—The only question is, whether the owners of the cargo are or are not entitled to their costs; because it was agreed by the Proctor for the owners of the vessel proceeded against, that whatever was the decree made in the case of the ship, a like decree should be made in the case of the cargo, with the exception of the costs; that question seems to have been reserved for the judgment of this Court. Now, in all ordinary cases, it is quite clear that the party so proceeding to recover damages for the loss or injury sustained by him, would be entitled to his costs also; and therefore the point is narrowed to this: whether, in the pro-

* See 7 *Monthly Law Mag.* 83.

ceeding on the part of the owners of the cargo, there has been any thing of culpable delay or vexation in conducting it, that ought to deprive them of their costs. Undoubtedly, the action was commenced at a very late period; but I think the circumstances of the case satisfactorily account for the delay; and I must also observe, that where the owners of a cargo, and the owners of a ship, which is run down, are different persons, I am not aware that this Court has any authority to compel the owners of the cargo to proceed at one and the same time, or to say that they are not entitled to proceed at a later period, if they think it their interest so to do. The Court would be extremely sorry to see vexatious proceedings, and double suits; and where it perceived parties, without just cause, resorting to such courses, it would not allow them the benefit of costs. But I do not in this case see that there was any attempt at such vexation; on the contrary, it appears to me that if the Proctor for the owners of the vessel proceeded against had consented, in the first instance, that the decree with respect to the ship should be binding with respect to the cargo, the small costs that had already accrued (with the exception merely of the arrest of the vessel) would altogether have been saved. I see no reason for not giving the owners of the cargo their costs, and therefore I shall pronounce for the motion, with the costs.

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The Diana.

Prerogative Court of Canterbury.

FEBRUARY 19.

IN THE GOODS OF SUSANNAH HARE, SPINSTER, DEC.—*Motion.*—The testatrix died 26th January, 1842, having made a will dated 4th August, 1841, in her own handwriting, and which purported to have been executed by her in the presence of two witnesses, workmen employed in the house. There being no attestation-clause, the affidavit of the witnesses was required, one of whom deposed that the deceased came into the room where they were, and desired him to see her sign her will, which she did in the presence of himself and co-witness, who was about three yards off. This other witness, however, did not recollect that he saw the deceased sign her name to the paper, though he was in the room at the time.

A paper attested by two witnesses, one of whom was unable to depose that the signature was made in his presence,—admitted to probate.

FEB. 19. *R. Phillimore, D.*, moved for probate.

Hare, dec.
JUDGMENT.

Motion
granted.

SIR H. JENNER FUST.—One of the witnesses deposes that the testatrix signed the will in the presence of both, and they subscribed their names in her presence. I think the requisites of the Statute were complied with. Decree probate of the paper.

W. Townsend, Proctor.

Administra-
tion with will
annexed grant-
ed to the widow
of a testator, on
behalf of a mi-
nor son, ap-
pointed execu-
tor, in the ab-
sence of a party
having a pre-
ferable claim.

IN THE GOODS OF RICHARD WIDGER, DEC.—Motion.

The deceased died 7th September, 1841, having executed a will dated 4th February, 1837, whereby he appointed his second son, by his first wife, sole executor. He bequeathed the interest of £500 Three and a half per Cents. to his widow (his second wife, by whom he had no children) for life, and after her death, or upon her re marriage, the money was to go to the executor, in trust to pay a portion of it to some other members of the family, but there was no specific disposition of the residue. The executor being a minor of 17, it was necessary for some person to take administration with will annexed on his behalf. The other next of kin were the eldest son and two daughters, one married, the other a spinster. The eldest son (who was of age) had gone abroad in 1833, and settled at Valparaiso; but he had not been heard of by his family since 1835, and it was doubtful whether he was living. The two sisters had renounced their right to administration, but the husband of the married sister had gone, as mate of a merchant-vessel, to the East Indies, and his return was uncertain.

MOTION.

Jenner, D., moved for a grant of administration, with will annexed, on behalf of the minor, to the widow, as his guardian.

JUDGMENT.

SIR H. JENNER FUST.—The renunciation of the married sister is not sufficient without a proxy from her husband; but it is necessary that there should be a representation, otherwise the widow would be deprived of what was intended for her, namely, the interest of the £500 stock; and although the Court would be unwilling, under any circumstances, to depart from the usual course of proceeding, to

protect the interest of an absent party; in this case, that party would be entitled to the grant, not for his own use and benefit, but for that of the minor. If the Court can, under special circumstances, depart from the ordinary practice, there is no reason why it should not do so in this peculiar case, which is a fit case for the exercise of its discretion. Decree administration with will annexed to the widow of the deceased, who has been elected by her son-in-law as his guardian for taking the administration for his use and benefit till he is of age.

Jenner, Proctor.

FR. 19.

Widger, dec.

Under the special circumstances,

motion granted.

IN THE GOODS OF JOHN MILES RIDSWAY, DEC.—*Motion.* A paper referred to in a will, but not written at the time the will was executed; not proved to have been written prior to the date of a later codicil, which did not refer thereto,—refused probate, as part of the will.

—The testator died 5th September, 1841, having made his will, dated the 5th October, 1838, thereof appointing his cousin T. R. and H. W. executors, and on the 27th, he duly executed the same. In this will is a bequest to his wife of "Such articles of household furniture as are specified in a written list, herewith, and signed by me and by one or both of my executors:" and on the third side of the sheet of paper appeared such a list, signed by the testator and the two executors. At the conclusion of the list are the following words: "I request also that a quarter of the annuity be paid her regularly in advance:" referring to a bequest in his will of an annuity of £30 to his wife for life. Upon inquiry of the executors, as to when the list was signed, it appeared that the will was written by H. W., one of them, who resided in London, and was sent by him to the testator in October, 1838, with a list of articles of furniture on a separate piece of paper, at which time there was nothing written on the third side of the will. H. W. could not remember the precise time when he signed his name to the list, nor whether T. R., the other executor, was then present. T. R., in his affidavit, stated that the testator, in July, 1841, produced the paper to him; that it had the testator's and H. W.'s names subscribed to it, and that the testator declared it to be his act and deed, and he (T. R.) thereupon signed it; but that H. W. was not present at that time. On the 22nd

FEB. 19. July, 1841, the testator duly executed a codicil, merely re-
Ridgway, dec. voking the appointment of H. W. as executor.
MOTION. *White, D.,* moved for probate of the will and the last-
mentioned codicil to the remaining executor.

JUDGMENT. *SIR H. JENNER FUST.*—When the list was written does
not exactly appear ; it was not written at the time when
the will was executed, in October, 1838 ; H. W., the execu-
tor, who wrote the paper, says that when he sent it to the
deceased, there was nothing written on the third side of the
will, and it is stated by T. R., that the testator produced it
to him in July, 1841, when it had the testator's and H. W.'s
names to it. Now this list is signed by the testator and by
the two executors ; but they do not sign it as witnesses, but
merely as identifying the paper, as that which the testator
referred to as "a written list, herewith, and signed by me,
and by one or both of my executors." On the 22nd July,
1841, the testator executes a codicil, the purport of which is
to revoke the appointment of H. W. as executor, and there-
fore, the supposition and the presumption is, that this
codicil was executed after the list was signed by the testa-
tor, as H. W. signed that list as one of the executors of his
will. But the effect of this codicil is not only to revoke the
appointment of the executor, but to confirm the will of Oc-
tober, 1838. The codicil of 22nd July, 1841, is signed by
a mark—I presume, because the testator was ill, as the list
is signed by him very well ; but there is no evidence that
the list was written on the will previous to the execution of
the codicil, or it is probable that there would be some re-
cognition of that paper ; but there is no reference to it, and
it should seem that it did not then form part of the testa-
mentary disposition of the deceased. Probate is asked of
the will and codicil, and that is the proper form, omitting
the list, as it was not in existence at the time the will was
written, and is not referred to in the codicil of the 22nd
July, 1841.

Jenner, Proctor.

A paper at-
tested by three
witnesses, at

IN THE GOODS OF JAMES MANSFIELD, DEC.—*Motion.*—The
deceased, who had been a pensioner sergeant in the service

of the East-India Company, died 2nd October, 1841, a bachelor, on board the ship *City of Poonah*, at sea. On the 27th September, his friend, W. D., at his request, drew up a will for him, which he executed in the presence of W. D., no other person being at that time present. The deceased wishing that R. B. and W. R. G.* should also witness the will, he (W. D.) left a space at the bottom of the paper for their signatures, inserting their descriptions, signing his own name beneath, in the presence of the deceased, delivering the will to him. On the same or the following day, R. B. being present with the deceased, and W. D. being also present, the deceased produced the will, and gave it to R. B., requesting him to witness the same, which he did in the presence of the deceased and of W. D., by signing his name in the blank left for it. On a subsequent occasion (when, was not remembered), W. R. G. being present with the deceased and R. B. and W. D. being also present, R. B. requested W. R. G. to witness the will, which he delivered to him; but no remark was then made by the deceased. W. R. G. then, in the presence of R. B. and W. D., and in that of the deceased, signed his name to the will in the blank left for it. These facts were stated in the affidavit of W. D., the only evidence produced. The effects were under £300.

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Manafield, dec.

different times, all being on one occasion present, the deceased having signed the paper, or acknowledged his signature thereto, in the presence of one witness only,—refused probate.

Pratt, D., moved for Letters of Administration, with will annexed (no executor being named therein), to the deceased's father, the principal legatee, expressing his fear that the Court could not accede to the motion.

SIR H. JENNER FUST.—The difficulty is to know whether there has been a sufficient execution. The father, the only person entitled to the property, in case of intestacy, is willing to take administration with the will annexed; but the question is, whether the Statute has been complied with; that is, whether the deceased made or acknowledged his signature in the presence of two witnesses present at the same time. There have been one or two cases coming pretty near to this in the circumstances. A very slight circumstance may make

MOTION.

JUDGMENT.

Similar cases.

* R. B. was a lieutenant in the 49th regiment; W. R. G. was the surgeon of the ship.

Feb. 19.
Mansfield, dec.

Motion re-
 jected.

all the difference. In one case,* a lady wrote a will herself, and sent for two witnesses to attest it, and when told that they had arrived, expressed joy: this was held to be an acknowledgment sufficient to satisfy the Act. [*Pratt*.—In *White v. The British Museum*,† it was held (under the Statute of Frauds) that the production of the will simply was sufficient. In the case of *Ann Allen*,‡ where the deceased executed the will in the presence of one witness, who attested it, and afterwards acknowledged her mark to another witness, in the presence of the former, and the latter witness subscribed the will in the presence of both, the Court declined to grant the motion for probate.] The Court in that case gave no express decision upon the point. In this case, I have not heard what information the other witnesses can give, as to what did actually take place. I shall reject the motion. I do so on the ground that no acknowledgment by the deceased to two witnesses present at the same time is proved: he merely produced the paper, and the witnesses subscribed their names to it.

Tebbs, Proctor.

Court of Surrogates of the Judicial Committee of the Privy Council.

FEBRUARY 22.

Appeal.— *FIFE v. BLUNT*.—*Motion*.—This was an appeal from a Practice. — 1. Libel not required to be signed by Counsel. — 2. This Court not competent to direct security to be given for costs. sentence of the Arches Court,§ in a suit for subtraction of tithes. The Appellant (who conducted the proceedings in person), in obedience to the assignation, brought in his Libel of Appeal. *The Proctor* for the Respondent objected that the Libel, as well as the Inhibition, was not signed by Counsel, as required by the 96th Canon.

* *In the Goods of Mary Warden*, 2 Curt. 334.

† 2 Curt. 331.

‡ 6 Bing. 310.

§ See *ante*, p. 173.

Dr. BURNABY held that the Canon* did not apply to proceedings in this Court, and admitted the Libel.

The Proctor for the Respondent then applied for an order of Court that the Appellant should give security for costs.

Dr. BURNABY declined to entertain the application unless made by Counsel.

Addams, D., for the Respondent.—I am ready to move that Mr. Fife be required to give security for the costs. There have been two appeals already, both of which were rejected; the case has been going on for four or five years, and the appeal is evidently for the purpose of vexation and delay, and nothing else.

Dr. BURNABY.—I cannot take upon myself to grant the motion; I must refer it to the Judicial Committee; it is more than a Surrogate can take upon himself to do. I sit here to expedite proceedings, and I could not delay them on account of a collateral matter.

Motion refused.

Thble, Proctor for the Respondent.

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Fife v. Blunt.

Motion for security for costs. Must be made by Counsel.

ARGUMENT.

Appeal vexatious.

JUDGMENT.

This Court not competent to grant the motion.

Refused.

Prerogative Court of Canterbury.

FEBRUARY 22.

IN THE GOODS OF LOUISA ELIZABETH COUNTESS OF DURHAM, WIDOW, DEC.—*Motion*—The testatrix, relict of the late Earl of Durham, died at Genoa, 26th November, 1841, having executed her will in duplicate, dated 3rd October, 1840, appointing her brother, the Hon. Charles Grey, and the Hon. John G. B. Ponsonby, executors. The will, after reciting that the late Earl, by his will, dated 29th September, 1837, had devised and bequeathed to her all his real and personal estate, and appointed her sole executrix and residuary legatee, devised and bequeathed all her real and

Probate of a revoked will of another party deceased granted as part of the will of the testatrix, which specifically referred thereto.

* The Canon directs "that no *Inhibition* shall be granted out of any Court belonging to the Archbishop of Canterbury, at the instance of any party, unless it be subscribed by an Advocate practising in the said Court."

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*Countess of
Durham, dec.*

personal estate to her executors, upon trust for her only son, the present Earl (a minor, aged 13), his heirs, executors, administrators, and assigns, to be conveyed to him when he should attain the age of 21, or, in case of his previous death, to the eldest of his issue male, when 21, or if he should die under 21 without leaving issue male living at his decease, then "upon the trusts, intents, and purposes expressed and declared in and by a will (afterwards revoked by the will of 29th September, 1837), executed by the late Earl, bearing date 12th April, 1826, or such of the said trusts, intents, and purposes, as shall be then existing and capable of taking effect;" and after providing for the maintenance and education of her son, or of such his issue male as should be presumptively entitled under the trusts, during his minority, and also of her other children, the testatrix, in case her son should die before 21, charged her real and personal estate with £20,000 to each of her three daughters, in addition to their portions under her marriage-settlement. By the will of the late Earl, dated 12th April, 1826, referred to in the will of the testatrix, his real estates are directed to be held (in the event of his not leaving any son, or issue male of any son) in trust for his brother (subject to certain conditions), with divers remainders over, the trustees to stand possessed of the leasehold mines, collieries, and other premises, upon the same trusts as the freehold hereditaments therein mentioned. After the testatrix had executed her will, and previously to her ladyship leaving this country, in October, 1841, she informed Mr. Stephenson, her confidential adviser, who wrote and attested her will, that she had deposited one part thereof in the strong-room at Lambton Castle, with the said former will of the late Earl, and upon search in such room after the funeral of the Countess, a packet, tied up and sealed with her seal, and endorsed with her initials, was found by Mr. Stephenson, and being opened by him in the presence of the Hon. Mr. Grey, one of the executors, and others, contained one part of the will of the Countess and one part of the former will of the late Earl; the other part of the will of the testatrix was in her own possession at Genoa, and had been brought to England by the Hon. Mr. Pon-

sonby, the other executor ; a duplicate of the former will of the late Earl was enclosed in a separate envelope, and deposited in the same strong-room at Lambton Castle.

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Countess of
Durham, dec.

Addams, D., in support of the motion for probate of the will of the Countess and of the former will of the Earl, as together containing the will of the testatrix.—The rule has been repeatedly recognized which is laid down in *Habergham v. Vincent*,* that, if a testator refers in his will to any paper, describing it so that there is no doubt of its identity, such

FEB. 19 and 22.
ARGUMENT.

Rule in
Habergham v.
Vincent.

paper becomes a part of his will. The present Will Act does not alter that rule ; it provides that a revoked will may be revived by a codicil ; but it does not require that the revoked will, in order to be revived, shall be present, if the codicil refers to it so specifically that it is impossible there can be a mistake. Here there cannot be a more specific reference than is made to the Earl's will of 1826 ; in addition to which, the papers are found together sealed up in the same envelope. [PER CURIAM.—I should like to be

Not altered
by the Will Act.

The paper
specifically re-
ferred to.

PER CURIAM.

satisfied as to whether the trusts created would be carried into effect by the Court of Chancery. There are minors whose interests would be affected.] Their interest depends upon the present Earl dying in his minority. If Lord Durham should die under 21, leaving no male issue, the trusts of the former will of the late Earl, relating to personal as well as real estate, cannot be carried into effect unless probate of it be granted as part of the will of the Countess, whose testamentary intentions may otherwise be defeated ; at all events, without an expensive Chancery suit. On the other hand, no inconvenience could arise from probate being granted of a document expressly referred to in the executed paper, and so clearly identified. [PER CURIAM.—The difficulty is to know what to do in case of opposition. The Court could not compel the production of the revoked will of Lord Durham. It is a difficult question, not so much with reference to this case as to other cases which it will govern, where the paper is not before the witnesses at the time of execution. At the same time, I do not know how I can refuse the motion. In *Smart v. Prujean*,† it was held

Inconveni-
ences of refusal
of motion.

PER CURIAM.

* 2 Ves. jun. 209.

† 6 Ves. 565.

FEB. 22. that, in order to incorporate an unattested paper with the will, they must be so identified that there can be no mistake.]
Countess of Durham, dec. Which is the case here.

JUDGMENT. SIR H. JENNER FUST.—There can be no doubt that the revoked will of the late Earl of Durham is the identical paper referred to by Lady Durham in her will, and that it was her intention that it should form part of her will. Great difficulty might arise in such a case if the paper were in the hands of a third person who could not be compelled to produce it. But still I cannot refuse probate to a paper so distinctly referred to. In such cases, however, these papers must not pass without the knowledge of the Court, unless it is a very special case. I do not mean to lay down the rule so strictly that no papers can pass except in open Court, because, under special circumstances, I would hear a case *in camera*. Decree probate of both papers.

Difficulty.

Such cases must be brought before the Court.

Motion granted.

Stokes, Proctor.

Consistory Court of London.

FEBRUARY 23.

A faculty cannot be granted for a church rebuilding, where re-consecration is necessary, till it take place.—Consent will not create a jurisdiction depending entirely *ratione loci*.

TURNER v. THE RECTOR AND CHURCHWARDENS IN SPECIAL, AND THE PARISHIONERS IN GENERAL, OF THE PARISH OF HANWELL.—*Motion*.—This was an application on the part of a parishioner of Hanwell, Middlesex, for a faculty for the making of a burial-place for himself and his family, in the parish church, to the exclusion of others. There was at the time of the motion no parish church, the old church having been almost entirely taken down, and a new one in the course of being built. There was a proxy of consent from the rector and churchwardens.

Addams, D., in support of the motion.

JUDGMENT. DR. LUSHINGTON.—I cannot grant such a faculty. How can I grant a faculty for a church not built? If the altar has been taken down, there must be a re-consecration, and my jurisdiction depends entirely *ratione loci*. [Addams.—

If altar taken down, a re-consecration necessary.

Could not the Court grant a faculty prospectively, upon consecration?] If I had jurisdiction: but no consent will create a jurisdiction where there is none.

Motion refused.

Feb. 23.

*Turnerv. Rector
&c. of Haswell.*

Till then,
Court has no
jurisdiction.

On the first Session of Trinity Term, the motion was renewed, and (the church having been re-built and consecrated) a faculty was granted.

VERE v. VERE.—*Cause.*—This was a suit for divorce, by reason of adultery, by the husband against the wife.

Practice.—

In a suit for divorce by reason of adultery, the fact of diversity must be proved by direct evidence.

THE COURT noticed that the *diversity* of one of the parties had not been proved by direct evidence, and that the fact could only be collected by travelling through the whole evidence; and required that, in all such cases, the rule of Court should be strictly observed, by establishing the identity and the diversity by direct evidence.

(The Court was satisfied with the proof in this case, and pronounced for the divorce.)

Indirect evidence received in this case.

Prerogative Court of Canterbury.

FEBRUARY 26.

COLLIER v. LANGE Bear, CONWAY, AND RIVAZ.—*Allegation.*—This was a business of proving in solemn form of law certain bequests contained in a paper purporting to be the will of Mary Ryan, spinster, dec., dated 2nd December, 1822, as being a supplement to, and to be taken as part of, the sixth codicil to the will of Philip Ryan, late of Brussels, dec.; promoted by Mr. John Collier, executor of the will and six codicils of Mr. Ryan (of which probate had been granted by this Court), against Susan Langebear, spinster, and Sarah Conway (wife of Mr. E. Conway), the residuary legatees named in the said sixth codicil, dated 26th May,

Probate of part of a will, sought to be obtained as referred to in, and forming part of, the will of another testator, under the circumstances, refused, as not identified beyond all doubt.

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Collier v.
Langebear.

1829, and against Mr. Francis Rivaz, an executor of the will with a codicil of Miss Mary Ryan, dated respectively 9th October, 1834, and 30th July, 1835. The Allegation propounding the portion of the paper in question pleaded that Mr. Philip Ryan, by his will (dated 10th September, 1824), proved in this Court, with six codicils, in August, 1841, bequeathed the residue of his property to his niece, Mary Ryan, absolutely; that by the sixth and last codicil to the will, he confirmed certain legacies by Miss Ryan then before purported to have been bequeathed to certain of her Irish relations, and gave the residue of his property to her for her life only, and after her decease to his great nieces, Susan and Sarah Langebear, in the following words:—"By my said will, I have left residue of my property to said Mary Ryan, which she has bequeathed certain sums of to relations in Ireland: Now I do hereby confirm those bequests or legacies, but hereby order that part of the residue of my fortune, to the amount of £400 sterling, shall, at Miss Ryan's death, be paid to said Francis Rivaz, his heirs or executors, and the total remains of said residue I now bequeath to my grand-nieces, Susan and Sarah Langebear, their heirs or executors;" that Miss Ryan died in 1837, having appointed Mr. John Collier (the executor of Mr. Ryan's will) and Mr. Francis Rivaz her executors; that, after her death, search was made in her repositories for papers connected with her property, and the only papers found of a testamentary nature, dated prior to 1829, were two (A and B), both dated 2nd December, 1822; that the paper A (purporting to be the draft or pattern from which B was transcribed) was (with the exception of two Christened names) in the handwriting of Mr. Philip Ryan; that the paper B was transcribed by Miss Ryan from A; that the bequests of £2,000 to J. MacLaughlin and £2,000 to Ann Kennedy are the very bequests referred to by Mr. Philip Ryan in his sixth codicil, who, by the clause of confirmation therein recited, adopted that portion of Miss Ryan's will, and that such portion was entitled to probate as part of Mr. Ryan's sixth codicil. The contents of paper B (almost literally the same as A) were as follows:—

I, Mary Ryan, residing at Bruxelles, in the kingdom of Holland, do declare this to be my last will and testament, having as yet made no other will, and for the execution of tenour and substance of said last will and testament, I do appoint my friends V. F. R., A. R., and F. R. jun., of London, or any two of them, as they shall agree to accept the charge, to be my lawful executors to this my last will and testament; by which I bequeath to my sister, Susan Langebear, wife of Richard Langebear, of Plympton, Devon, the sum of £3,000 sterling, to be placed by my said executors in the public government funds, or upon solid security: said sum to be held for her whole and sole use, and not to be subject to any debts contracted or any other engagements made by her above-said husband: Still, in case of her decease, said Richard Langebear to enjoy during his natural life interest of profit arising from above legacy bequeathed to his wife, and upon said Richard Langebear's decease, said sum of £3,000 to his son and daughters, Robert, Marianne, and Jane. I bequeath to Josipt(*sic*) MacLaughtin(*sic*), of Neneagh, in the county of Tipperrary(*sic*), in Ireland, who was married to my sister Catherine Ryan, the sum of £2,000 sterling, to be paid him upon my decease, deducting duties, commission, and other charges, or in case of his decease prior to me, the said sum to be paid to whom ever he shall have appointed to receive the said sum, to be equally divided between the children of him and my said sister. I also bequeath to my sister Ann Kennedy, of Killanaul, the sum of £2,000, to be paid her upon my decease, subject to same conditions as my above legacy to Josipt MacLaughtin. The residue of my estate and effects to be equally divided between the son and daughters of my sister Susan Langebear and Richard Langebear her husband, and the children of my sister Ann Kennedy, of Kellinnaul(*sic*), and my sister Catheren(*sic*) MacLaughtin, wife of Josipt MacLaughtin. I hereby positively order that any one or more of my said legatees for this will and testament that shall dispute, trouble by law-suits, against the opinion of my said executors, and in case of need, the decision of two arbitrators, and a third as umpire, shall be cut off from any legacy or claim upon any part of my property, and such legacy or legacies to be equally divided between the others above non-disputing legatees. As at present, my property is in the public funds, and in case of a war with any power may be subject to losses, upon paying said legacy or legacies, such legatee or legatees must bear their proportion of loss upon sales of stock or other securities in which said property may be placed at the time of my decease. Witness my hand-writing, the 2nd Decembre, at Bruxelles, in the year of our Lord, 1822. MARY RYAN.

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Paper B.

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Langbeear.*

ARGUMENT.

Harting, D., for the residuary legatees in the sixth codicil of Mr. Ryan, against the admission of the Allegation.—In the case of *Smart v. Prujean*,* the Lord Chancellor said: "The rule of law is, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way, that the Court can be under no mistake." "Judging as a private individual, there can be no doubt that, when he executed the will, he meant that instrument and these two letters should have their effect; but unless the rule of law allows me, I cannot establish the letters." "The rule and my opinion are, that the will has not by its contents sufficiently identified these papers to enable me to say they are necessarily incorporated." And in a leading case, that of *Habergbam v. Vincent*,† the Lord Chancellor says: "I cannot conceive but that a will may be good by reference to some other paper, no matter what. When the thing referred to is ascertained, it is as much a part of the will as if it was within the sheets. I remember one case where a woman devised her estate to the same uses to which her husband had devised by his will: the consequence was, his will became hers; her will passed her estate; but to know what was done, it was necessary to refer to the other will." And in the same case, Mr. J. Wilson says: "I believe it is true, and I have found no case to the contrary, that, if a testator in his will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will; and such reference is the same as if he had incorporated it." In *Wilkinson v. Adam*,‡ the Lord Chancellor said: "The cases, as far as they have gone, have raised doubts even as to a paper antecedently existing, but clearly and undeniably referred to in a will; but I take it to be decided, and there is no doubt, that a paper made afterwards could never be a part of the will." "It is not necessary to examine how far the *dicta* to be found where a will attested by three wit-

* 6 Ves. 565.

† 2 Ves. jun. 209.

‡ 1 Ves. & B. 445.

nesses refers to an antecedent paper can be supported; but there was no period of this testator's life in which it could be asserted that, if he had died at that moment, any book whatsoever would have formed part of his will. The book was ambulatory to the last moment of his existence, and it is impossible, upon the principle of the case of *Smart v. Prujean*, to maintain that this book was part of his will as to the real estate." The Court must reject this Allegation; first, because the paper is not sufficiently identified, for the paper of 1822, signed by Miss Ryan, so far as the Court can collect from the documents, cannot be that referred to by Mr. Ryan; "by my will," which he did not execute till 1824, "I have left residue of my property to Mary Ryan; which she has bequeathed certain sums of to relations in Ireland; now I hereby confirm those bequests of legacies;" in the next place, at least it was as ambulatory as the book in *Wilkinson v. Adam*. In the case of *Lady Durham*,* the document was so clearly identified, that there could be no possible doubt; whereas here, on the face of the document, it cannot be the one alluded to, for it would appear that Miss Ryan had bequeathed in a document, dated in 1822, property which was not bequeathed to her till 1824.

Burnaby, D., appeared for Mr. Rivaz, the executor of Miss Ryan's will.

Addams, D., for the parties interested in the bequests, in support of the Allegation.—If the case stood only upon the codicil and paper B, there might not have been a sufficient identification in law, though no moral doubt; but paper A was written by the deceased, and given by him to his niece to copy, and which she does copy, and therefore it is made part of his will, B being a literal copy of A. Though dated in 1822, *non constat* that it might not have been copied afterwards. When he refers to bequests made by his niece to her relations in Ireland, which he confirms, and when we find this paper of 1822 in the hand-writing of Miss Ryan, which is a literal transcript from a paper in the hand-writing of Mr. Ryan, there can be no moral or legal doubt that it is a part of his will: as far as he could, he adopted the bequests as his

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*Collier v.
Langbeear.*

* See *ante*, p. 365.

- FEB. 26.** own, and incorporated them into his sixth codicil. [**PER CURIAM.**—Must I not consider these bequests as part of Miss Ryan's existing will, which is not proved, before I can pronounce for them as part of Mr. Ryan's will? Suppose she had revoked them, or destroyed the paper?] Mr. Ryan took away from her the power of revoking; had she destroyed the paper, if the legacies could be ascertained, they would be pronounced for. [**PER CURIAM.**—The case is left short. Miss Ryan, in this paper, disposes of her own property, and the provision at the end, that the legatees are to bear a proportion of any loss on sales of stock, is most material. There is no reference there to her uncle's property, only to her own property in the funds: how can I assume that it has reference to property forming part of her uncle's will?] It is word for word as her uncle wrote it for her. [**PER CURIAM.**—But you must shew me that Miss Ryan had no property of her own to dispose of. Her will is made in 1822, and his will not till 1824; therefore, *primâ facie*, her will does not dispose of his property, but only of her own. I cannot understand, under the circumstances, how I am to consider her will as part of the sixth codicil of Mr. Ryan, by which he confirms the disposition she had made of part of the residue. At present, I cannot say that this is the document referred to by Mr. Philip Ryan in his sixth codicil. It is possible that Miss Ryan had no property of her own. In order to justify the Court in incorporating one paper with the other, the paper must be identified beyond all doubt, and the Court must be satisfied that it is the identical paper referred to by the deceased.]
- PER CURIAM.**
- JUDGMENT.** **SIR H. JENNER FUST.**—The bequest of the residue by Mr. Ryan to his niece is contained in his will, dated in 1824, and he is supposed to refer in his codicil of 1829 to her bequest of a part of the residue in a paper of 1822, that is, before she had the property bequeathed to her by the will of which probate has been taken. *Primâ facie*, this is not the paper which could have been referred to by Mr. Ryan, since it is not to be presumed that Miss Ryan could have disposed of the property before it was left to her, and therefore it must be some other property that the paper refers

to. And I am rather confirmed in this impression by the fact that she disposes of property to a considerable amount, none of which can be considered as part of that in the will of Mr. Ryan, as he only confirmed that part of her will which referred to her relations in Ireland. This seems to be a complete disposition of the whole of her property, not of the property derived from her uncle, for she says: "As, at present, my property is in the public funds, and in case of a war with any power, may be subject to losses, upon paying said legacy or legacies, such legatee or legatees must bear their proportion of loss upon sales of stock or other securities in which said property may be placed at the time of my decease." So that, in fact, she disposes of the whole of her own property. There is only the circumstance that this paper B was copied from paper A, which is in the hand-writing of Mr. Ryan, and which he, for some purpose or other, gave as a form to her. The paper is a formal will. It is true, there are persons named in it who are relations resident in Ireland; but the bequests are two sums of £2,000, not part of Mr. Ryan's residue. [Addams.—The "residue" would be the residue of her effects generally.] Why not refer to that residue? [Addams.—She could not separate them.] He gave her the residue: either she had the property or not; if she had, she has disposed of the whole of her property, and not merely of that she had from Mr. Ryan. I cannot hold that this is the paper (on the present shewing) referred to by Mr. Philip Ryan, *beyond all doubt*. I am of opinion that the facts pleaded in this Allegation, with the contents of the papers themselves, are not sufficient to enable the Court to hold that the portion of Miss Ryan's will is incorporated as part of Mr. Ryan's will, and I reject the Allegation.

FEB. 26.

Collier v.
Langebear.

Paper not
identified be-
yond doubt.

Allegation
rejected.

Proctors:—*Cox* for the executor of Mr. Ryan; *Abbot* for the legatees; *Heales* for the executor of Miss Ryan.

High Court of Admiralty.

MARCH 2.

Salvage.—A suit for compensation not sustained, on the ground that the vessel (a foreigner) was not in danger.—A commission of appraisement improperly taken out.

THE "WILHELMINE."—*Act on Petition.*—This was a claim by the master, owners, and crew of the steam-vessel *Robert Burns*, belonging to the Commercial Steam Navigation Company, of salvage for services rendered to the *Wilhelmine*, a Hanoverian galliot, on the 12th October, between the Needles Point and Hurst Castle, Isle of Wight. The owners of the galliot resisted the demand, on the ground that the vessel was in no danger, and that the master merely wanted a pilot. The owner of the galliot had alleged the value of the property to be £400. The salvors represented it at £620. A commission of appraisement was thereupon taken out, which returned the value at £320.

Jan. 31.
ARGUMENT.

Addams, D., and *Robertson*, D., appeared for the salvors; and *Haggard*, D., and *Harding*, D., for the owners.

March 2.
JUDGMENT.

DR. LUSHINGTON.—When I originally read the papers in this case, it appeared to me to be one of some difficulty; not on account of conflicting evidence only, but because some of the disputed questions were of a nature so purely nautical, that I could not, with entire satisfaction to my own mind, form my opinion of them. My difficulties were not removed by what passed at the hearing; and regretting the want of the assistance of Trinity Masters, I felt it my duty to take time to consider, and to endeavour to obtain from the best sources some information upon local and nautical points which it was impossible I could possess.

The questions
of a nautical
character.

It appears that the *Robert Burns* steamer left Southampton on the 11th October, bound to Plymouth, with between twenty and thirty passengers; that, in consequence of a gale from the S. and W., the steamer anchored off Yarmouth for the night, and in the morning set sail. In a subsequent part of the proceedings, it is alleged, on behalf of the *Robert Burns*, that another steamer, the *Transit*, suggested to the *Robert Burns* to go to the assistance of a vessel said to be in distress on a lee shore; and the reason assigned why it was suggested that the *Robert Burns* should go, in pre-

ference to the *Transit*, was, that the former was of lighter draught. Certainly, unless the master of the *Robert Burns* had verily believed that this vessel was in want of assistance, it is difficult to suppose that he, with so many passengers on board, would voluntarily have delayed her voyage, without necessity; but, assuming this to have been the honest conviction of the master, it is still the duty of the Court to consider and determine whether the *Wilhelmine* really stood in need of any assistance beyond that of a pilot. And this brings me to the first and most material point in controversy—whether the *Wilhelmine*, when riding at anchor, was in a dangerous situation, requiring salvage assistance? What was her distance from the shore? The salvors say—and here is a very great discrepancy in the evidence—that she was close to the shore; another expression is, that she was about a cable's length from the shore. The evidence for the owners of the *Wilhelmine* states that the distance was from three-quarters of a mile to a mile. The best solution of this difficulty, where the evidence is so conflicting, and where I should most reluctantly impute wilful and corrupt misstatement to either party, is, to take the actual distance as between the two statements.

MARCH 2.

The Wilhelmine.

The salvors may have believed the vessel in need of assistance; but

Before deciding whether this vessel was in a state of danger or not, it would be well to consider whether the master of the galliot believed she was in danger, and, acting on that belief, whether the flag hoisted was for a pilot or for assistance; for if the latter, it would at least prove that, in his own judgment, he deemed his vessel to be in some degree of peril. Upon this part of the case I think the evidence strongly preponderates in favour of the owners. The balance of disinterested evidence is in their favour, and the master has positively sworn to the fact; and on the principle I have before adverted to, of not hastily imputing perjury to any one, I should not be justified, unless absolutely compelled, in attributing to him a wilful mis-statement; and of the fact, whether he hoisted a signal for a pilot or for assistance, he must have been cognizant. Looking, therefore, to the positive evidence from him, and those who

the master did not, and

MARCH 2. formed the coast-guard on the station, it is established, to my satisfaction, that the flag was a signal for a pilot only.
The Wilhelmine.

the salvors
have not proved
this fact.

Coming back, then, to the question whether, in fact, and apart from the opinion of either party, and assuming the distance to be the medium between the conflicting statements, and taking the wind to be, as stated by the salvors, from the W. and S.W., and the tide to be on the ebb, which is undeniable, and the vessel drawing seven feet water—taking these to be the facts, and I think it is a just and fair statement to both parties, was the vessel so circumstanced in danger, and did she require assistance? Not at all doubting that the masters of the steamers who have given evidence are possessed of reasonably competent knowledge to enable them to give an opinion upon the question, yet I must recollect that the *onus probandi*—the *onus* of proving the danger which they allege, and which is the very foundation of their claim to salvage—lies strongly and justly on the salvors; and if the question stood on balanced evidence, I cannot say that the salvors' averment is proved. Now, looking at the opposing evidence—that of the lieutenant of the coast-guard, a person most competent, from his local knowledge and nautical skill, to give a correct opinion; perfectly disinterested, and against whom I cannot find even the slightest ground for imputing bias; the light-house keeper at Hurst Castle, a witness deserving great weight in a matter of this kind, which must be within his knowledge and nautical experience; and adding to these the coast-guard boat-men, who depose to facts of importance, of which they had the means of forming an accurate opinion—looking at the whole of the evidence, I have no hesitation in saying that the balance preponderates greatly against the vessel being in any danger whatever.

But I was reluctant to leave such a question as this upon the mere comparison of weight and credit due to statements so conflicting on such a subject, and more especially as local knowledge and nautical skill might throw light upon it, and enable me to adjudicate between the parties with greater security and more to my own satisfaction. I therefore caused inquiries to be made as to the nature of the ground

itself, with reference to the given circumstances already stated, of the wind, tide, distance, and draught; and I am perfectly satisfied, from the result of these inquiries, made of persons who have great local experience, and knew nothing of this case, nor the purposes for which the questions were asked, that the weight of evidence in the cause and the truth coincide, and I am enabled with confidence to say, both with regard to the evidence itself and such local information as I have been enabled to obtain, that this vessel was not in any danger whatever.

MARCH 2.
The Wilhelmine.

The vessel in
no danger.

In further corroboration of this view of the case, I am well satisfied that the master and crew of the *Wilhelmine* did, in the conviction that there was no danger, voluntarily refuse the proffered aid of a rope, which the steamer attempted to send on board, and of which, had they been disposed, they might have availed themselves; nor can I believe that the galliot's people laid themselves along the bowsprit, jib, and flying jib-boom, with the intention of catching the rope.

With regard to the galliot's slipping from her cables, that undoubtedly is a circumstance which weighed very strongly with the Court at the time of hearing, and is not lightly to be passed over; but, so far as I am capable of forming a judgment, it is not a proof of actual danger; it is a measure of precaution, frequently resorted to, for the sake of convenience and expedition, and that at a small expense; for it is well known that, by attaching a buoy to anchors and cables, they may easily be recovered. I am not, therefore, justified in considering that circumstance, standing alone, as the least proof of the vessel being in a state of peril.

Now, I do not think it necessary to enter into detail with respect to the further facts; for, if there was no danger when the vessel was lying at anchor, undoubtedly, there has been no salvage service performed. When the galliot was proceeding with a fair wind to Cowes, it is impossible to contend that the putting two men on board could support a claim for salvage reward. I entertain, indeed, very considerable doubt whether, when a pilot was at hand, this proceeding was even justifiable. The Court has also to regret

- MARCH 2.** that, in such a case as this, the salvors should have taken out a Commission of Appraisement—a proceeding, in any view I can take of the case, wholly unjustifiable.
- The Wilhelmine.*
- Claim fails.** I am of opinion that the claim for salvage has wholly failed; that there is no just ground for the demand; and
- Costs.** I must dismiss the galliot, and condemn the asserted salvors in the costs.

March 4. No bail had been given, and on the Proctor for the *Wilhelmine* praying a *supersedeas* of the warrant of arrest, the Court decreed it; but, on a subsequent day, it thought there was a difficulty in issuing the *supersedeas* immediately, and allowed a week (as a reasonable time) to elapse.

June 29. In the sittings after Trinity Term, the Proctor for the owner moved the Court that the adverse Proctor might be assigned to set forth his clients' names, with special reference to the owners of the *Robert Burns*. The Proctor for that vessel submitted that he was not now bound to do so, and stated that, in fact, he did not know who the owners were, the action being entered in their behalf as matter of course. The Court, however, held that the Proctor was bound to know all the parties for whom he appeared, and to state their names, otherwise proxies would be required.

Proctors:—*Deacon* for the foreign owners; *Addams* for the asserted salvors.

MARCH 9.

Proceeding under 3 & 4 Vict. c. 65, to recover the amount of an anchor and cable supplied to a foreign ship—not sustained, by reason of absence of all proof by plaintiffs that a third anchor and cable were **THE "ALEXANDER."**—*Act on Petition.*—This was a proceeding against a foreign vessel, the *Alexander*, belonging to Drobak, in Norway, by Messrs. Mitcheson and Son, of Limehouse, anchor-smiths, to recover the sum of £46. 13s. for an anchor and cable furnished to that vessel in the year 1835. The proceeding was under the Stat. 3 and 4 Vict. c. 65, and, at the commencement of the suit, the owner of the vessel (John Martin Burchardt) appeared under protest, alleging that, as the Statute passed in 1840, and the debt had been incurred in 1835, this Court had no jurisdiction. The

protest, however, was overruled,* and the case now came on for hearing upon its merits. The Act on Petition alleged that the articles were supplied, as necessaries for the ship, at the desire and request of Sorenson, the master; that the account was made out against the owner, to whom repeated applications had been made for payment without effect. In reply, the owner denied that the articles were supplied to the ship, and alleged that the master purchased them for his own private account and use, informing the plaintiffs, at the time of purchase, that they were not for the use of the ship, which was not, at the time the anchor and cable were sent on board, in want thereof, she being furnished with her proper number; that the owner never authorized the master to purchase, nor was he on the return of the vessel informed by him that he had been compelled to purchase, or that he had purchased, an anchor and chain cable, and that the said anchor and cable were never used on board the ship, nor ever taken into the stores of the owner, but were sold by the master, on his next subsequent voyage, at Havre de Grace, for his own account and benefit. The plaintiffs, in their rejoinder, denied that the articles were supplied to the master for his own private account, or that he stated that they were not for the use of the vessel, for that they were ordered by him in his capacity of master, and agent of the owner, and were put on board the vessel for its service, and after being so put on board, the master called at the counting-house of the plaintiffs for the account, when he admitted to the clerk who drew it out that the articles had been supplied for the use of the ship and were chargeable against the owner, and the account was accordingly drawn out against the owner, in duplicate, one being given to the master, and the other, signed by him, was exhibited.

Addams, D., for the plaintiffs.—There was no disclaimer, on the part of the owner—although he has been repeatedly applied to, as well as the master who succeeded Sorenson—till November, 1840, after the Statute had passed, and after the bankruptcy of Sorenson, who is his brother-in-law. What are the necessaries in question? Not

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The Alexander.

necessary for such a ship.—
Onus of proof on parties supplying a ship.—
Less evidence may prove necessity in case of anchor and cable than in other cases; but some evidence indispensable.

ARGUMENT.

* See *ante*, p. 185.

MARCH 9. provisions, but an anchor and cable; can these have been for the private use of the master? The bill, dated 11th July, 1835, is headed, "The owners of the ship *Alexander*, Capt. Sorenson; bought of Wm. Mitcheson and Sons;" and this is signed by Sorenson himself. The owner swears that

Owner responsible for master's acts.

the vessel did not want a third anchor and cable: but the master is his agent, and he is responsible for his acts. The affidavits on behalf of the plaintiffs prove that the articles were ordered by Sorenson in his capacity of master and agent of the owner, and were put on board the ship, for its use; that no intimation was given to them that they were for his own private account; that, on the contrary, the master stated that they were supplied for the use of the ship, and were chargeable to the owner, and that, although Moroe, who succeeded Sorenson in command of the vessel, had been several times applied to personally by the plaintiffs for a settlement, neither he nor the owner had intimated that the debt was due by Sorenson, prior to the letter from the owner of the 10th November, 1840, repudiating the claim. A question might arise, whether some articles so furnished were necessities; but there can be no doubt in the case of

No intimation that articles ordered on master's private account.

Tradesmen not bound to inquire if such articles were absolutely required.

an anchor and cable: it is not incumbent upon a person supplying such articles to go on board the ship and see whether they were actually required.

Jenner, D., for the owner.—Notwithstanding the articles may have been supplied by desire and at the request of the

Unless articles were absolutely necessary, master had no authority to bind his owner; and onus on party claiming to prove necessity.

master, unless they were absolutely necessary for the use of the ship, he had no authority to order them, and, having exceeded his authority, the owner is not responsible; and the *onus* of proving them to be necessary is upon the party setting up the claim. The master is not the general agent of the owner, but his agent for a particular purpose, namely, as master of the vessel. "The authority of the master is to provide *necessaries*; if, therefore, a person trusts him for a thing not necessary, he trusts him for that which it is not within the scope of his authority to provide, and consequently has no right to call upon his principal for payment."* And "in order to constitute a demand against the

* *Abbott, Shipp.*, P. 2, c. 3.

owner, it is necessary that the supplies furnished by the master's order should be reasonably fit and proper for the occasion ;"* and such as a prudent owner would order, if he were present. That these articles were not necessary appears from the affidavits. It is not because they are an anchor and cable, that, therefore, they must have been necessary—that would be a good reason for supplying twenty anchors. If one anchor was supplied more than the vessel required, it must be held to have been supplied on account of the party who ordered it. The affidavit of the owner shews that the vessel was provided with two anchors and cables, which were sufficient for its purposes, and that the anchor and cable furnished never came into his possession. Sorenson himself swears that they were taken for his own account, which he intimated to the plaintiffs, and were sold by him without the privity of the owner, and the mate and boatswain swear that the articles were never used in the ship. That the *onus* of proving the necessity is upon the creditor, was decided in the case of *Cary v. White*,† as in analogous cases of supplies of necessities to an infant, or a wife living apart from her husband. On the other hand, it is not even averred expressly that the articles were necessary for *this* vessel. The notion of making the owner responsible was an afterthought, for in the plaintiffs' letter to Sorenson, the master, in May, 1837, they appear to hold him, not the owner, responsible for the debt. The owner must be dismissed, with costs.

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The *Alexander*.

The articles shewn not to have been necessary.

Not even averred that the articles were necessary for *this* vessel.

Addams, D., in reply.—The line of defence set up in the Act on Petition was, that the articles were supplied to the master for his own private use ; now it is shifted, and it is said the articles are not necessities. But although the vessel had two anchors and cables, was not a third almost absolutely necessary? Is it not usual for a vessel of 240 tons to have a third anchor? Do we not hear this doctrine constantly urged in salvage cases? When a master comes to an anchor-smith, and orders an anchor, is it incumbent on the tradesman to go on board the vessel, and overhaul

REPLY.
Although the vessel had two anchors, a third almost absolutely necessary.

* *Abbott, Shipp.*, P. 2, c. 3.

† 1 Bro. P. C. 284. *Abbott, Shipp.*, ut sup.

Q. Now I ask you, before he executes the order? No more than a
 to collect upon a tailor or dress-maker, who supplies
 a man or a wife, to ransack their wardrobe
 The master should, at once, and from the first, have re-
 fused the claim, and expressly said that the master had re-
 fused his authority.

THE JUDGE.—This being the first contested case
 which has arisen under the Act 3 and 4 Vict. c. 65, I have
 set it by me to bestow my best attention both upon the
 facts and upon the law: and if I entertained any doubts as
 to the judgment I ought to pronounce, or imagined that any
 further investigation would tend to elucidate either, I should
 take time for further consideration: but I do not believe
 that any benefit could arise from delaying my judgment.

There are some material facts which are most satisfactory
 proved. First, that the chain and cable were ordered by
 the master, the then master, and actually put on board the
 vessel. The defence is twofold: first, that the plaintiffs do
 not give credit to the owner, but to the master exclusively,
 who informed them that the anchor and cable were to be
 supplied to him on his own account, and not for the use of
 the ship. Second—and this has been much relied upon—
 that the anchor and cable were wholly unnecessary for the
 use of the ship, because she was already well and sufficiently
 equipped with anchors and cables, having two of sufficient
 size on board. And here I may observe that I cannot agree
 with the learned counsel who last addressed the Court, that
 this defence has not been specifically pleaded and set forth.
 for I find in the Act on Petition, on behalf of the owner,
 the following words: "And he further alleged that the ship
 was not, at the time the anchor and cable were sent on
 board, in want thereof, she being furnished with her proper
 number—to wit, two anchors of the respective weights of
 19 cwt. and 12 cwt., and which were the same that were on
 board when the ship sailed from Drobak, in the preceding
 month of June, and when she returned thereto, having been
 in constant use, both on her outward and homeward voyages;
 that the said party never authorised the master to purchase,
 nor was he, on the return of the vessel, informed by the

...er that he had been compelled to purchase, or that he purchased, an anchor and chain cable for the use of the ship, and that the anchor and cable were never used on board the ship." It appears to me that this statement directly puts in issue the point, namely, whether the anchor cable were necessary for the use of the vessel.

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With respect to the first ground of defence, it is expressly denied; and the question is, whether it is proved by the evidence; for, if established, it is clearly a sufficient defence against the present claim—that is, if the master indebted the plaintiffs, at the time he ordered the anchor and cable, that they were for his own private account, and not for the use of the ship. The principle on which the owner of a ship is made responsible for necessaries furnished to him by order of the master, is that, for such purposes, the master is an agent of the owner, and must be presumed to act under his authority and for his benefit. But if a tradesman or material-man were distinctly informed that the articles were not for the use of the ship, but ordered on the private account and credit of the master, the whole legal hypothesis, upon which the responsibility of the owner depends, is gone and utterly extinguished. In law, therefore, the defence is perfectly well-founded, if it is supported by the facts.

With respect to the facts, I must observe that, *a priori*, it is not very probable, though it is undoubtedly possible, that an anchor and cable should be taken as an article of mere merchandize; but it is still more improbable that the material-man in this country should trust a foreign master, disclaiming the liability of the owner, and for the purpose of assisting the master's speculation in such articles of merchandize. But if such a transaction be *a priori* improbable, the very first document in the cause renders it infinitely more so. The account, rendered at the time, of which a copy is annexed to Mr. Mitcheson's affidavit, distinctly bears to be an account against the owner, and it is signed by Sorenson himself. Now, if the present version of the dealing be true, Messrs. Mitcheson were guilty of what might justly be termed a fraud; for, having given credit to the

The fact improbable,

and inconsistent with evidence.

MARCH 9. her stores, before he executes the order? No more than it is obligatory upon a tailor or dress-maker, who supplies clothes to an infant or a wife, to ransack their wardrobes. *The Alexander.* The owner should, at once, and from the first, have repudiated the claim, and expressly said that the master had exceeded his authority.

The owner should have repudiated the claim at first.

JUDGMENT.

DR. LUSHINGTON.—This being the first contested case which has arisen under the Act 3 and 4 Vict. c. 65, I have felt it my duty to bestow my best attention both upon the facts and upon the law; and if I entertained any doubts as to the judgment I ought to pronounce, or imagined that any further investigation would tend to elucidate either, I should take time for further consideration: but I do not believe that any benefit could arise from delaying my judgment.

Defence two-fold;

There are some material facts which are most satisfactorily proved. First, that the chain and cable were ordered by Sorenson, the then master, and actually put on board the vessel. The defence is twofold: first, that the plaintiffs did not give credit to the owner, but to the master exclusively, who informed them that the anchor and cable were to be supplied to him on his own account, and not for the use of the ship. Second—and this has been much relied upon—that the anchor and cable were wholly unnecessary for the use of the ship, because she was already well and sufficiently equipped with anchors and cables, having two of sufficient size on board. And here I may observe that I cannot agree with the learned counsel who last addressed the Court, that this defence has not been specifically pleaded and set forth; for I find in the Act on Petition, on behalf of the owner, the following words: “And he further alleged that the ship was not, at the time the anchor and cable were sent on board, in want thereof, she being furnished with her proper number—to wit, two anchors of the respective weights of 13 cwt. and 12 cwt., and which were the same that were on board when the ship sailed from Drobak, in the preceding month of June, and when she returned thereto, having been in constant use, both on her outward and homeward voyages; that the said party never authorised the master to purchase, nor was he, on the return of the vessel, informed by the

master that he had been compelled to purchase, or that he had purchased, an anchor and chain cable for the use of the ship, and that the anchor and cable were never used on board the ship." It appears to me that this statement directly puts in issue the point, namely, whether the anchor and cable were necessary for the use of the vessel.

MARCH 2.
The Alexander.

With respect to the first ground of defence, it is expressly denied; and the question is, whether it is proved by the evidence; for, if established, it is clearly a sufficient defence against the present claim—that is, if the master informed the plaintiffs, at the time he ordered the anchor and cable, that they were for his own private account, and not for the use of the ship. The principle on which the owner of a ship is made responsible for necessaries furnished to it by order of the master, is that, for such purposes, the master is an agent of the owner, and must be presumed to act under his authority and for his benefit. But if a tradesman or material-man were distinctly informed that the articles were not for the use of the ship, but ordered on the sole account and credit of the master, the whole legal hypothesis, upon which the responsibility of the owner depends, is gone and utterly extinguished. In law, therefore, the defence is perfectly well-founded, if it is supported by the facts.

first, credit not given to owner, but to master.

With respect to the facts, I must observe that, *a priori*, it is not very probable, though it is undoubtedly possible, that an anchor and cable should be taken as an article of mere merchandize; but it is still more improbable that the material-man in this country should trust a foreign master, disclaiming the liability of the owner, and for the purpose of assisting the master's speculation in such articles of merchandize. But if such a transaction be *a priori* improbable, the very first document in the cause renders it infinitely more so. The account, rendered at the time, of which a copy is annexed to Mr. Mitcheson's affidavit, distinctly bears to be an account against the owner, and it is signed by Sorenson himself. Now, if the present version of the dealing be true, Messrs. Mitcheson were guilty of what might justly be termed a fraud; for, having given credit to the

The fact improbable,

and inconsistent with evidence.

MARCH 9. master solely, they would seek to charge the owner with the debt, against all good conscience and fair dealing. This is not hastily to be presumed; nor, though the master be a foreigner, should I be justified in assuming, independently of what is sworn, that he would be so incautious as to take a document, according to his present account, entirely the reverse of truth; for his present statement is, that he bought the anchor and cable on his own account; and yet the document, which he has signed, purports to be a purchase on account of the owner. It was attempted to be argued, that it was not a fair inference from this document that the owner was intended to be solely charged: but this is wholly immaterial to the decision of this case, because, I apprehend, both the master and the owner may be responsible—not jointly, but severally; that it is in the power of the tradesman to resort to either one or the other, as he may think most convenient.

Master and owner both responsible.

The next document is the letter of the 5th May, 1837, addressed to Captain A. Sorenson:—

Sir,—We have been for a long time past expecting a remittance from you for the amount of anchor and chain supplied in July, 1835, two years since—amount £46. 13s. If not immediately paid, we shall be obliged to send the account to our agent in Norway, to recover the same. The goods were sold at six months' credit only; and, further, it is quite inconsistent to think we can allow such long credit as you have taken. Annexed is a copy of the account; and expecting to hear from you by return of post,

We remain, Sir, yours obediently,

W. MITCHESON and SON.

In my opinion, that document standing alone goes a very little way to support the case of the owner; for the master was liable as well as the owner, and it was not at all unnatural that they should apply to him in the first instance. But, contrasting it with the account made out and delivered to the master himself, I think it is impossible to contend that the letter proves that credit was given solely to the master, in entire exoneration of the owner.

The letter of November 10, 1840, addressed from Mr. Burchardt, the owner, at Drobak, to Messrs. Mitcheson and

Son,* is a mere disclaimer on the part of the owner, and, whether it be true or false, can in no degree whatever affect this case; for Mr. Burchardt's liability cannot depend upon any thing he says now, but upon what was done at the time the anchor and cable were supplied. With a similar observation I may dismiss the memorandum or endorsement of the master :† a bankrupt assuming a debt, in exoneration of his brother-in-law, is no evidence upon which any Court could rely, and this, too, at the expiration of five years after the transaction. I am well satisfied that the documentary evidence does not support the defence.

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Then what is the defence upon affidavit? Mr. Burchardt cannot speak to any material fact; for the concealment of the master, or the sale of the anchor and cable elsewhere, cannot *per se* affect the question to whom credit was given. The master's affidavit is the only other applicable to this part of the case; for the mate only speaks to what he understood. If the master's statement were uncontradicted, it might go far to establish the defence; but let us look at the evidence on the other side. Mr. Mitcheson, sen., states expressly, that the articles were ordered by the master in such capacity, and as the agent for the owner; that they were debited to the owner; that they made repeated applications to the owner, to his brother-in-law, Sorenson, and to Moroe, who succeeded him in the

* The letter is to this effect: "Gentlemen,—I have duly received yours of the 24th ult., by which I observe that Captain Sorenson is indebted to you in the sum of £46. 13s. I have nothing to do with the payment of said amount, as I know my ship *Alexander* has never got any of the goods mentioned, but the captain says he bought them for accmpt of Mr. N. Carlsen, of this place. Said Mr. Sorenson is declared bankrupt, to your information. I am highly dissatisfied by being demanded to pay an amount which does not concern me, and beg you not to trouble me with further correspondence on the subject."

† The memorandum was endorsed on the owner's letter, in the Swedish language, to this effect: "My debt to you, £46. 13s., I have always acknowledged; but this matter does not at all concern my owner, Mr. J. M. Burchardt. When I, in the course of this year, was constrained to surrender my estate to the Bankruptcy Court, I at the same time notified your claim, and you will derive equal privilege with the other creditors."

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command of the vessel; but never, until the 10th November, 1840, was the least intimation given to him that the account was owing by the master, and not by the owner. Mr. Mitcheson, jun., directly contradicts Sorenson; and I may here observe that the allegation in the Act on Petition is, that Mitcheson and Son were "informed" that the anchor and cable were not for the use of the ship; but the master, in his affidavit, merely says that, when purchasing the articles, he "intimated to Mr. Mitcheson, jun., that they were not intended to be used on board the barque." Mr. Forbes, the clerk, speaks to the admission of the master. It is impossible, I think, under these circumstances, to doubt the conclusion to which the Court must come as

This defence fails.

Second ground,
—that articles
not necessary.

to this fact; namely, that this defence wholly fails. The second ground of defence still remains to be considered, viz. that such anchor and cable were not wanted for the use of the ship; and I greatly regret to find that, in the reply to the Act on Petition, no notice has been taken of this averment, as if it were not most material to the issue of the cause. That averment, however, involves a most important question of law, and I have deemed it my duty to investigate it as minutely as possible.

Jurisdiction conferred by stat. not to alter law, but to give a new remedy, under condition.

When the recent statute conferred on this Court a jurisdiction in these matters, or rather, perhaps I should say, revived an ancient jurisdiction long disused, it never was or could be intended to alter the law, but merely to give a new remedy, necessary from the peculiar circumstances of foreign ships, and confined to that necessity. I will state in one sentence what I apprehend to be the condition necessarily imposed upon the Court. This Court must not make the ship liable for any article for which, under similar circumstances, the owner, if resident here, would not be responsible in a Court of common law: I believe, however, that there is no real distinction upon this point between that law and the law administered in the Court of Admiralty.

Meaning of term "necessaries."

In common parlance, it is said that the owner shall be responsible for *necessaries* furnished to a ship; but if an erroneous meaning be put on the word "*necessaries*," great confusion will arise. In one sense, an anchor and cable is a

necessary, for a ship cannot do without them; but it does not, therefore, follow that, at all times, or that at any particular time, a new anchor and cable are necessary for the use of the ship. It is not sufficient to say that they are necessities, but they must be necessary at the time, and under the existing circumstances, in the sense the law requires.

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Looking to authorities, the first I shall advert to is the Authorities.

case of *Webster v. Seekamp*.* I may first observe that, in all cases of this description, it is necessary to bear in mind the distinction between the advance of money, and doing repairs or furnishing articles for the ship's use. With respect to the advance of money, not only does the *onus probandi* lie on the party who advances it, to shew that it was necessary for the use of the ship, but it is absolutely incumbent upon him to shew that it was applied to such purpose. With regard to repairs and articles furnished, I am of opinion that the *onus probandi* still lies upon the person doing the repairs or furnishing the articles, but in a less stringent degree, and under the limitation shewn by the case I have referred to. It was an action of *assumpsit*, by the plaintiffs, brass-founders, to recover their charge for coppering the vessel (which was bound from Liverpool on a voyage to Newfoundland and the Mediterranean), by order of the master. It was proved on the trial that, although it was extremely useful to copper vessels bound to the Mediterranean, it was not absolutely necessary, and the Judge (Mr. Justice Best) left it to the jury to say whether coppering was useful and proper for a vessel bound on such a voyage, and what a prudent owner would have ordered. The jury found that it was, and the plaintiffs obtained a verdict. On a rule *nisi* for a new trial, Lord Tenterden said: "It was contended at the trial, that the liability of the owners was confined to what was absolutely necessary: I think that rule too narrow; for it would be extremely difficult to decide, and often impossible, in many cases, what is *absolutely* necessary. I am of opinion that, whatever is fit and proper for the service on which a vessel is engaged; whatever the owner, as a prudent man, would have ordered, if present at

Webster v. Seekamp.

Definition of
"necessaries"
per Lord Tenterden;

* 4 Barn. and Ald. 354.

MARCH 9. the time, comes within the meaning of the term 'necessary,'
 as applied to those repairs done or things provided for the
The Alexander. ship, by order of the master, for which the owners are lia-
 and *per Best, J.* ble." Mr. Justice Best said: "The mode of ascertaining
 what is necessary is to ask what a prudent man himself
 would do if he were present. The case of *Cary v. White* is
 very distinguishable from the present; for there, money
 was supplied to the captain, and he had the opportunity of
 applying it to any purpose he thought proper, which is a
 very different case from that of necessary repairs done to a
 ship." The principle which I extract from this case seems
 to me very clearly laid down by the Court, and to be very
 simple, very just, and consistent with the interests of all
 parties, namely, "What a prudent man himself would do,
 if he were present."

Principle of
 that case;—

"What a pru-
 dent owner
 would do."

The doctrine laid down by Lord Tenterden, in his book
On Shipping, which was referred to in the argument, is
 the same as that stated in *Webster v. Seekamp*; and there
 are many other cases which illustrate the doctrine of the
 personal responsibility of the owner, and shew that the *onus*
 is upon the creditor to prove the actual existence of the
 necessity of the articles which give rise to his demand.

Robinson v. Lyall.

v. Thus in *Robinson v. Lyall*,* which was a case of money ad-
 vanced to the master of the ship, the Court held that, so far
 as the money was proved to have been advanced for the
 necessary purposes of the ship, the owners were liable. In
Rocher v. Busher,† and in *Palmer v. Gooch*,‡ the same doc-
 trine was held, that it is necessary to prove the advance of
 the money; that it was necessary for the use of the ship,
 and that it was so applied.

Rocher v. Busher;
 and
Palmer v. Gooch.

Result ;—*onus*
probandi on
 plaintiff.

The result of these authorities is, that in both cases—in the
 advance of money, and in the supply of necessities or do-
 ing repairs—the *onus probandi* lies on the plaintiff to shew
 that such money was advanced for the necessary purposes of
 the ship, or that the supplies or articles furnished were
 requisite and proper, such as a prudent owner, if on the
 spot, would have ordered: the difference is only as to the
 extent of proof required. A person who advances money to

Distinction
 between cases
 of advance of
 money; and

* 7 Price, 592.

† 1 Stark. 27.

‡ 2 Stark. 428.

a master of a ship ought never to rely upon the security of the owner unless he takes precautions to ascertain that the money so advanced is applied to the benefit and use of the owner. The doctrine laid down by a very learned writer upon American law, I mean Mr. Justice Story, in his work on Principal and Agent,* appears to me in no respect to differ from the decisions of our own legal authorities; nor can I find any case in our own law, which in the slightest degree militates against it. The only case which has come to my knowledge, in which, to a certain extent, a contrary doctrine was laid down, is that of *Craigie v. Ogilvy*, in 1707, decided in the Court of Admiralty in Scotland, during the time that jurisdiction subsisted,† which would tend to establish a distinction between furnishing for the use of the ship articles which are *primâ facie* necessities, and lending money for the purchase of articles. But this distinction, though to a certain extent founded in good sense, is contrary to a whole current of decisions, and wholly unsupported by any authority in English law.

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 supplies or repairs, only as to extent of proof of necessity.
 Concurrent opinion of Mr. Justice Story.
 Adverse decision in Scotch Court of Admiralty.

I so far agree, that, in the case of an anchor and cable, less evidence might suffice to prove necessity, in the legal sense of the term, than in other cases; but still I cannot divest myself of the conviction that the law requires some

Less evidence may suffice to prove necessity of anchor and cable.

* "So, the authority of the master, as to repairs of the ship, even in a foreign port, is limited to those which are necessary repairs; but by necessary repairs we are not to understand such repairs only as are indispensable for the safety of the ship, or the due performance of the voyage; but such as are reasonably fit and proper for the ship or for the voyage, under the circumstances of the case."

† "Ogilvy and Izett, owners of the *Olive Branch*, were sued by Craigie, a ship-master in Montrose, who, at a port in Norway, had furnished, at desire of the master of the *Olive Branch*, a cable, value £36: defence; no cable necessary, and so the question was, whether necessity must be shewn in such a case. The Judge-Admiral recognized a distinction between the furnishing of naval stores, and the loan of money; holding it requisite only in the former case to look to the necessity: he also recognized a distinction between articles of ordinary use and necessity to the vessel's safety, and articles manifestly superfluous, as mere luxuries (a Turkey carpet, *ex. gr.*, for the cabin): he repelled the defences, reserving all questions between the owner and the ship-master." Bell. *Comm. on Laws of Scotland*, i. 431.

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such evidence; and I think that this doctrine, of casting the *onus probandi* upon the plaintiff, the tradesman or material-man furnishing the articles, is founded upon a great and important principle, and that the rules resulting therefrom have been framed with much wisdom, to prevent great abuses. To charge one man for the acts or dealings of another is, *primâ facie*, contrary to natural law; but when it appears that such other person is entrusted by him, and authorized to a given extent; when, in short, the relation of principal and agent is established; then it becomes reasonable to affix the principal with responsibility, but a responsibility properly guarded and restrained, by requiring the creditor to use reasonable diligence to ascertain that the want of the articles is such, that the owner himself, if present, would have sanctioned the purchase.

Plaintiffs have
 merely averred
 nature of arti-
 cles;

Then, do the facts of this case bring the plaintiffs within the principle? They have contented themselves with simply stating the nature of the articles furnished, not attempting to answer the defence by any evidence whatsoever; and the case resolves itself into this—that the defence is supported by evidence wholly and entirely uncontradicted. If this defence had been denied to exist in point of fact, though it might have been difficult at the present moment to supply evidence as to the precise state and condition of the vessel at the time the anchor and cable were had; yet it might have been a matter of no difficulty (seeing it is stated, on behalf of the owner, that the vessel is of the burthen of 240 tons, and had but two anchors and cables) to have proved by the evidence of persons accustomed to these matters and acquainted with nautical affairs, that, going upon the voyage upon which she was going, pursuing the avocations to which she was accustomed, a third anchor and cable were articles which the owner, if a prudent man, would, if present, have sanctioned. But there is no such evidence; and it is impossible that the Court can, in lieu of such evidence, take the argument of Counsel that, in salvage cases, much has been said as to the propriety of having three anchors and cables. I cannot pretend to a judgment so accurate in regard to what is requisite for the safety of a vessel,

as to take upon myself to say what is the proper number of anchors and cables with which such a vessel ought to be furnished. I think that the *onus probandi* rests upon the plaintiff, and has been absolutely deserted altogether, not an atom of evidence being offered. On the other hand, the defence is supported by the affidavit of the owner, who swears that he had on board the proper number of anchors required for the voyage, and that, in fact, the anchor and cable purchased by the master were never used. The affidavits of the master, mate, and boatswain are to the same effect.

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whereas, defendant has shewn non-necessity.

I am of opinion, therefore, that I am bound to pronounce that the plaintiffs have failed in their proof, and further, that the owner has established his defence. The plaintiffs were fully warned of what the defence would be, and they have not attempted to answer it. The defendant has not only proved his case according to the law, but I think the defence is complete both in law and in fact. I think the defendant has gone to the full extent, for he has proved a negative where the plaintiffs, who were bound to prove the affirmative, have offered no evidence at all. Under these circumstances, I must pronounce against the claim, and my decree must be followed by a condemnation in costs, except those of the protest, with which I cannot saddle the plaintiffs.

Plaintiffs have failed in proof,

and defence complete, in law and fact.

Claim rejected,

with costs.

On the Default Day, the principle of the foregoing decision was applied by the Court to the case of an advance of money to a foreign master. The *Sophie*, a Danish vessel, having received damage in a collision with another vessel in the Mersey, put back to Liverpool, where the master (who was likewise the owner) applied to a firm there for advances to get the damages repaired. They accordingly furnished the requisite sum, £133, and subsequently arrested the ship. As no bail had been given, after the usual defaults, the Court was moved to sign the *primum decretum*, that the ship might be sold. Some of the items in the account were advances of money to the master alleged to be for the ship's use.

March 16.
The Sophie.

Advance of money to master and owner.

DR. LUSHINGTON.—I have considered this subject very attentively since my judgment in the *Alexander*, and I am satisfied that

JUDGMENT.

MARCH 9. I never can make a ship responsible for that for which an owner would not be responsible; and therefore it is absolutely essential, in order to found a claim in this Court, not merely that the articles should be called necessities, but that the ship should really want them at the time. The difficulty that arises under the Act 3 and 4 Vict., c. 65, is with reference to the word "necessaries." This term, used in the ordinary sense, would mean anchors, cables, rigging, and matters of that description. I have already restricted it to what is wanting at the time, and I consider myself as enlarging it by applying it to money expended for necessary purposes. But I must be satisfied that the money was wanted for such necessary purposes. On the present occasion, it appears to me that, so far as relates to the articles specified, as no doubt the owner himself would be responsible, he having been present and given the order, I am justified in making the ship responsible. But I have a difficulty with respect to the money, because, unless that was absolutely wanting at the time, although the owner would be responsible at common law, it never could be intended to give this Court jurisdiction to make the ship responsible for the mere debt of the owner. I must, therefore, require a further explanation. I must have an affidavit to shew that the money was advanced for the necessary purposes of the ship, and that it was actually so expended.

Proof required that money advanced for necessary purposes of ship, and so applied.

April 19. (Subsequently, such proof was furnished, and the Court signed the *primum decretum*, and ultimately decreed the sale of the vessel.)

May 10.

Prerogative Court of Canterbury.

MARCH 15.

Probate of a will having been taken out in a wrong jurisdiction, and the property administered under such void grant; application for probate in this Court (the proper *forum*),

IN THE GOODS OF WILLIAM HOGG, DEC.—*Motion*.—The deceased died 24th February, 1801, having executed his will, dated 3rd October, 1799, appointing his sons T. H. and W. H. executors, of whom W. H. was also named residuary legatee. In May, 1801, W. H. proved the will in the Archdeaconry Court of Bucks, the effects being sworn under £5,000, power being reserved of making the like grant to the other executor. The testator was, at the time of his death, beneficially entitled to £850, secured on mort-

gage of certain lands and premises situated in the Archdeaconry of St. Albans, in the diocese of London—the Archdeaconry of Bucks being in the diocese of Lincoln. This sum, with the interest, after the death of the testator, was paid to the executors, who, by indenture of assignment, dated 8th July, 1822, acknowledged the receipt of the principal sum from the parties entitled to the freehold of the premises, to whom the executors, by the said indenture, assigned over the mortgage and all their interests therein. On the 15th January, 1828, W. H., one of the executors and the residuary legatee, died intestate, in the life-time of his co-executor, who afterwards died without having proved the will. The effects of the testator were got in and administered under the probate granted by the Archdeaconry Court of Bucks, and all the accounts had been closed many years since. In order to make the assignment of the mortgage valid, it was necessary that the original will of the testator should be proved and placed upon record in this Court, for which purpose the will was transmitted from the Archdeaconry Court of Bucks, the effects (in respect of which administration, with will annexed, was prayed) being sworn to be under £100.

Addams, D., moved for administration, with will annexed, *MOTION.* of the effects unadministered, of Wm. Hogg, the father, to be granted to the representative of Wm. Hogg, the son, deceased, intestate.

SIR H. JENNER FUST.—It is clear that the grant obtained in the Archdeaconry Court of Buckingham is a void grant to all intents and purposes, and that all acts done under it were void. Now, application is made to this Court for a grant of administration, with will annexed, to the representative of the son of the testator, his executor and residuary legatee (and he undoubtedly would be entitled to the grant), to enable a party to make a legal and valid title to a mortgage, and it is said, it is only necessary to have the will proved here, and placed upon record in this Court. But I want to know how it is possible—if the testator had, at the time of his death, *bona notabilia* in the province of Canterbury sufficient to found the jurisdiction of this Court, and if

MARCH 15.

Hogg, dec.

to make a valid title, refused, the effects being sworn at a less amount than that of the property administered.

DECREE.

Original grant absolutely void, and all acts under it void.

MARCH 15. on the face of the papers there was property in one diocese amounting to £850—that I can permit the party to swear

Hogg, dec.

The property exceeded the amount in the *jurat.*

that the property is under £100, the grant having been a void grant, and all acts done under such a grant being void. The very ground of asking for this administration is, that the testator, at his death, possessed a property worth £850. The grant under which the effects have been administered is not a voidable grant, but a grant absolutely void, and therefore it is that administration, with will annexed of the testator, to the representative of the residuary legatee, is sought, for the purpose of enabling the party, to whom the executors assigned the mortgage, to make out a title to £850. How can I then allow the property to be sworn under £100? [*The Register.* It is contrary to practice.] The Court would be willing to make the grant if it could get rid of the difficulty, the property being all disposed of, and the accounts closed; still, as there has been a void grant, and all acts done under it being void, I cannot say, where there is a property worth £850, that the effects are under £100. [*The Proctor.* The duty, under £5,000, was then only £30; now it is £80.] It ought to be paid to the full amount, under £5,000.

Duty due on full amount.

Motion rejected.

Motion rejected.

For, Proctor.

An addition to a will, containing the appointment of executors, written below the attestation of the witnesses, who were unable to depose whether it was there at the time of execution, refused probate.

IN THE GOODS OF ROBERT JONES, DEC.—*Motion.*—The testator died 26th February, 1842. On the 8th August, 1839, being at the Reform Club House, in Pall Mall, of which club he was a member, he requested two servants of the house to witness the execution of his will, which he then produced to them, the whole being in his handwriting, and he duly executed the same in their presence, and they subscribed their names as witnesses at the same time, in the presence of the testator, in the following manner. At the end of the will appears the testator's signature, on the left-hand side of which are the names of the two witnesses, described as "servants to the club," but there are no words of attestation. Then follows (in the handwriting of the tes-

tator) an addition, to this effect: "I name O. O., P. G. W., and my brother, E. J., executors of this my will, and bequeath nineteen guineas to each for their trouble in executing the same." Then follows the signature of the testator, and on the left-hand side of it are the words: "Witnessed by the above persons," but there are no signatures. Throughout the will, the testator speaks of his executors, directing them to do various acts; but their names are not mentioned except in the addition underwritten. The witnesses are unable to say whether such addition was or was not in the will when executed, nor have they any recollection of the testator's having acknowledged more than his signature.

MARCH 15.

Jones, dec.

Addams, D., in support of the motion for probate of the whole. As the testator contemplated having executors, and speaks of their acts in the body of the will, it is probable that the addition was made to the will, and signed by him, before the execution was attested, though the witnesses do not recollect whether it was so or not, and though he did not see them subscribe their names to the addition as well as to the will itself. [PER CURIAM. There is no doubt about *PER CURIAM*. His intention to appoint executors.] The question is, whether, on the face of the paper, these two persons, being both present together, and required to sign both the will and the addition, may not have subscribed their names to the first signature only, and not under the words "witnessed by the same persons," by a mere oversight. [PER CURIAM. No *PER CURIAM*. doubt, it is not improbable; the addition might have been there at the time, and they may have forgotten it, two years and a half ago. But what can I do?] The Court would be rather astute to grant probate in such a case. [PER CURIAM. *PER CURIAM*. So I would if I could—if I was not bound by the Statute.]

SIR H. JENNER FUST.—I am afraid, in this state of the facts, I cannot grant probate of the addition. The will is regularly attested in the presence of two witnesses, and in this addition the testator appoints executors, and of his intention to do so there is very little doubt, and I think it is not improbable that the addition was in the will at the time it was attested; but the witnesses do not say so, and the words,

MARCH 15. "witnessed by the above persons," may have been written after the execution. It is not a part of the will; it is not in the body of the will. I am afraid I cannot, with reference to the Act of Parliament, grant probate of the addition. It is not attested by the two witnesses who attested the will, who cannot say that it was there at the time the will was executed, though it is probable that it was so, and that the deceased had signed his name to it. I presume the testator thought that sufficient, and there is no probability that it was added after the execution.

Jones, dec.
The addition not part of the will, nor attested.

Motion re- I must reject the motion: I am sorry for it.
jected.
Addams, Proctor.

A deed of settlement admitted to probate as part of a will, which referred to it.—
A notarial copy, under the circumstances, received, instead of the original deed.

IN THE GOODS OF THOMAS DICKINS, DEC.—*Motion.*—
The testator died 13th February, 1842, having made his will, dated 24th August, 1840, appointing his eldest son, T. D., sole executor. He left two sons and two daughters. By his will, he devised and bequeathed all his real and personal estate to his son, T. D., upon trust for him and the other children, in equal shares, the shares of the three younger to be held by the eldest, T. D., his heirs, executors, administrators, and assigns, upon the same trusts, and for the same purposes, and subject to the same provisos and restrictions, as are mentioned in an indenture of settlement, dated 20th November, 1830, made between the testator and his son T. D., or upon so many of the said trusts, intents, and purposes, as were then subsisting, or capable of taking effect. In an affidavit, the executor deposed that the deed referred to in the will, and which was in his possession, relates, amongst other things, to freehold and copyhold estates, which are thereby assigned to him, upon the trusts therein mentioned, and that upon the sale, or mortgage, or other conveyance thereof, it would be absolutely necessary for him to produce the said deed, especially at the Courts of Manors to which such estates belong, and therefore it is not in his power to leave the original deed in the Registry of the Court.

MOTION. *Haggard, D.*, moved for probate of the will of the tes-

tator to the executor, with the settlement, but without the original deed referred to therein.

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Dickins, dec.
DECREE.

SIR H. JENNER FUST.—The paper referred to in the will is sufficiently identified, and was in existence at the time when the will was executed, and therefore, upon the same principle upon which the Court decided the case of Lady Durham's will,* it will hold this deed to be a part of the testator's will, although not executed in the manner required by the Statute: because the paper is sufficiently identified for the Court to be certain that the deed of settlement of 20th November, 1830, is the paper referred to in the will, and contains the trusts upon which the executor was to hold the shares bequeathed to the three other children. The Court is asked to decree probate of the will without the original settlement, on the ground (admitting, therefore, that, under ordinary circumstances, the settlement should form part of the probate) that the deed is necessary to be retained in the possession of the trustee, to enable him properly to execute his trust. The Court is always unwilling to put parties to the expense and inconvenience of parting with papers of importance, and as it will be in the power of the Court to require the original settlement to be brought into the Registry, I think if a notarial copy be now brought in, and form part of the probate, it will be sufficient. [*Haggard*.—We have no objection.] Circumstances may arise in which it may be extremely difficult to get at the original settlement, and yet the parties interested under it should have the opportunity of knowing the nature of the interest they possess.

The deed held to be a part of the will.

A notarial copy to be brought in;

Let a notarial copy of the settlement be brought in and form part of the probate, as incorporated with the will. and to form part of the probate.

Denne, Proctor.

IN THE GOODS OF MARY ANN PENNINGTON, SPINSTER, Alterations in DEC.—*Motion*.—The testatrix died suddenly, in May, 1841, the will, dated in 1833, of an possessed of property amounting to about £8,500. After her unmarried testatrix, who had death, there was found in a trunk, sealed up in an envelope, a power of ap-

* *Ante*, p. 365.

MARCH 15. a will made by her in 1833, duly executed and attested by two witnesses, which purported, amongst other things, to dispose of certain money (£2,000 Three per Cents.) over which she had a power of appointment, under a deed of settlement. In the first and second sheets of the will were alterations, the intention of which was to reduce a legacy to a niece from £2,000 to £1,000. They were believed to be in the testatrix's handwriting, but there was no evidence as to the time when they were made, beyond the affidavit of the attesting witnesses (the drawer and his clerk), who deposed that they were not made at the time of execution. The alterations occurred in the execution of the power of appointment, which was originally a good execution. The executors, being also the residuary legatees, would be benefited by the alteration, if established; but they were desirous of probate as the will originally stood.

MOTION. *Addams, D.*, in support of the motion to that effect.—The power having been originally well executed, and the alterations being without the formalities required by the indenture of settlement, they are inoperative, and the tenor of the former words being apparent, the alterations can have no effect under the Act.

DECREE. *SIR H. JENNER FUST.*—The will having been found sealed up, it must be presumed that any alterations therein must have been made by the testatrix or by her direction; I should very much doubt whether they were in the deceased's handwriting. The witnesses depose that the alterations were not in the will at the time of execution; and not being made in the presence of and attested by witnesses, they cannot be operative under the power. Of the time when they were made, there is no account; and there is nothing to lead to the presumption that it was before or after January, 1838. But this lady, being unmarried, had a right to make her will and to dispose of her own property, in any way she pleased. The Court must decree probate of the will in its present state, leaving a Court of Equity to say what shall be its construction and effect. It is a very different case from alterations under the new Act; and if this had been the will of a married woman, another question might have arisen.

Here she was entitled to make her will in any form she pleased. MARCH 15.

Pennington, dec.

Probate with the alterations and interlineations.

Cor. Proctor.

IN THE GOODS OF EDWARD JACOB, Esq., DEC.—*Motion.* Unattested alterations in the will of a barrister, without evidence as to when made, on presumption, admitted to probate.

—The testator (an eminent member of the Equity Bar) died at Malta, 15th Dec. 1841, having made a will, whereof he appointed three executors. He gave the residue of his property in equal shares to his four sisters, for their lives, and after the death of either, he directed her share to be divided in equal shares amongst her children on their attaining twenty-one; and that if any of the sisters should die without leaving issue obtaining a vested interest, the income of her share should be divided amongst her sisters who might be living, till the death of the survivor, and the principal sum so constituting the residue was given to such of his nephews and nieces as should attain twenty-one. The words in this bequest, “and nieces,” are interlined in the second side of the will, and there is also an interlineation of “in equal shares,” and an obliteration of the words “of the age of twenty-one years.” The two subscribed witnesses (domestic servants of the deceased) depose, in their affidavit, that they saw only the *third* side of the will. The will, which was in the testator’s handwriting, was found sealed up in an envelope, and was dated 4th June, 1841; the envelope was endorsed “The will of E. J., June, 1841.” The testator had one nephew, and no niece, at the date of the will, and at his death.

Addams, D., moved for probate of the will as it stood, *MOTION.* with the alterations. There is no direct evidence to shew that the testator made them before execution, but it is highly probable that he did so, the whole appearing to have been written *uno contextu*, and with one and the same pen. The testator well knew what the law required. It is singular that Mr. Jacob should not have had the alterations attested; but it would be still more singular, and

MARCH 15. quite improbable, that he should have made them after execution.

Jacob, dec.

DECREE.

The circumstances lead to presumption that the alterations were made in writing the will;

no circumstance to the contrary.

Motion granted.

SIR H. JENNER FUST.—The deceased was a gentleman whom we all knew and all lament. From the tenour and context of the will, it would appear that he made these alterations as he wrote it. Looking to the contents of the paper, and to the character of Mr. Jacob,—a gentleman high in his profession,—and to the manner in which the attestation clause is expressed, I cannot suppose that the alterations were made after execution, knowing, as he must have done, what was required by the Act. I am clearly of opinion that they were made by him at the time the will was written, and there is no one circumstance which leads to the presumption that they were done afterwards. Under these circumstances, the Court is bound to decree probate of the paper in the form in which it now appears; and there can be no doubt that, as he went on, and read what he had written, he made these alterations.

Probate of the will decreed in the form in which it then stood.

Townsend, Proctor.

Probate of a will granted to a person not, under the circumstances, answering the precise description given by the testator, but *cy-pres.*

IN THE GOODS OF WILLIAM HAYNES, DEC.—*Motion.*—The testator died at Mirzapore, in the East-Indies, 2nd December, 1834. By his will he appointed, as executors in the East-Indies, J. S. P., of Mirzapore, and R. C. P., of Calcutta, and the Archbishop of Tuam as executor in Ireland; and he directed his two executors in India to realize and collect his property, and remit the proceeds by bills to the Archbishop of Tuam for the time being, to whom he gave full power and authority to dispose of the whole estate amongst his (the testator's) family, who lived in and near the city of Tuam, in such portions as should appear to the Archbishop's discretion fair and just, and they were required to abide by his decision therein. The two Indian executors proved the will in India in December, 1834, and on 1st August, 1835, a probate was granted by this Court to the Archbishop of Tuam, he being such at the time of the tes-

tator's death, power being reserved to the other executors. The property within the province of Canterbury was sworn under £14,000. The executors in India collected the estate, and remitted the proceeds, through their agents in London, to the Archbishop of Tuam, who distributed the same amongst the testator's relations, under the direction of the Irish Court of Chancery. In March, 1839, the archbishop died, and since his death some monies belonging to the estate were remitted by the executors in India, and further sums, to the amount of £2,500, were shortly expected; but there was no person at present authorized to give a discharge, or to carry the trusts of the will into effect. By the 3 & 4 Will. 4, c. 37, it is enacted, that when the archiepiscopal sees of Tuam and Cashel should become void, the archbishops should cease to have archiepiscopal jurisdiction, which should be transferred to the Archbishop of Armagh, to whose jurisdiction the Bishop of Tuam should be subject. The residence of the Bishop is at Tuam.

MARCH 15.

Haynes, dec.

Addams, D., moved for a second probate to the Bishop of Tuam, as one of the executors of the testator, power being reserved to the other executors in India.

SIR H. JENNER FUST.—The question is whether, as the Archbishop of Tuam is appointed executor, a second grant can be made to a person who does not answer the precise description of "Archbishop of Tuam," but who is Bishop of Tuam, though he succeeded the Archbishop. Now, there is no doubt that the deceased thought that a person likely to have a knowledge of the residences of the parties entitled to the property would be the proper person to be executor of his will, and not one who was a perfect stranger to them, and that he would not have made the Archbishop of Armagh his executor. I am clearly of opinion that the bishop of Tuam is entitled to the grant; that he is the person meant by the deceased—it is not as respects his archiepiscopal jurisdiction, but his diocesan jurisdiction. The difficulty is, as to the form in which the grant should go. [*Addams*.—It would be granted to the present Bishop of Tuam as executor substituted.] There must be a special probate.

Object of the testator.

The bishop the person meant.

Motion granted.

Nelson, Proctor.

MARCH 15.

IN THE GOODS OF FRANCIS WILLESFORD, DEC.—Motion.—The deceased died 28th January, 1842, leaving a will and codicil, wherein he named his three sons (the Rev. F. T. B. W., H. M. B. W., and C. W.) executors. The will was executed on the 15th June, 1841. On the first side was the following clause: "I also give to my said three sons the several watches, jewels, silver or such other articles as are enumerated in the paper hereunto annexed, allowing my wife the use of the several silver articles so given by me to my son Harry during her life." On the third side, towards the conclusion of the will, he directs that, after payment of his debts, his sons should have his undisposed of real and personal estate, share and share alike, "but on the terms and conditions hereinbefore expressed, and that the paper hereunto annexed, as referred to by me, be deemed as a further distribution of my effects." On the death of the deceased, the will and codicil were found in a sealed packet, with a paper attached to the will by a pin, which paper purported to dispose of plate and jewels, and other articles, and began: "For the Rev. F. T. B. Willesford, in accordance with my will;" and ended, "reserving for my wife the use of such silver articles for her life, in accordance with my will;" and at the top of the third side were the following words: "This is the paper referred to by my will as hereunto annexed. Francis Willesford, 15 June, 1841." By a similar clause, apparently obliterated, at the foot of the second side, this paper appeared to have been annexed to a former will, dated 11th June, 1839, and also to a will dated in May, 1841, and to have had two witnesses' names to it, as well as the testator's. The papers were all in the handwriting of the deceased. The two subscribed witnesses deposed that, although they do not recollect to have noticed so as to identify the paper as being annexed to or forming part of the will, they believe it was so annexed thereto at the time of execution.

MOTION.

Sir J. Dodson, Q. A., moved for probate of the paper annexed, being identified as part of the will and codicil.

DECREE.

Sir H. Jenner Fust.—It is extraordinary that so many cases of this kind should occur after *Lady Durham's case*.

The question is, whether the paper is sufficiently authenticated as that which the testator referred to in his will, to enable the Court to pronounce for it as part of the will. Now it is found pinned to the will, and the testator states expressly that it is the paper he referred to. In the case of *Lady Durham*, as far as a decree on an *ex parte* motion can decide any thing, the Court has held that a paper which was in existence before the date of the will, and is referred to in it, if sufficiently identified as the paper intended by the deceased, may form part of the will, notwithstanding such paper is not attested in the manner required by the Act. In this case the paper is sufficiently identified, and it is clear that it was in existence at the time when the will was executed, it having been a schedule to a will of 1839. The Court is, therefore, bound, following up what it has already done (although these cases have lately multiplied, and it should be careful not to introduce any new doctrine), to pronounce for this paper as forming part of the will of the deceased. There is sufficient evidence that the obliterations were made at or before the execution of the will, and there is nothing to shew that they were made afterwards; therefore, let probate pass of the paper as part of the will, and with the obliterations, as it now stands.

MARCH 15.
Willenford, dec.

Paper sufficiently identified.

Motion granted.

W. Townsend, Proctor.

IN THE GOODS OF THE REV. JOHN FREDERICK USKO, DEC.—*Motion*.—The deceased died 31st December, 1841 (having been for eighteen months totally blind), a widower, without children. On or about 26th November, 1840, he requested his male servant (D. M.) to take down in writing instructions for a will, which, he said, he intended that a Proctor should prepare for him. D. M. accordingly reduced to writing the instructions (paper C) which the deceased gave him on the first and last sides of the paper. He read them to the deceased, who said, "I think I have gone too far, by disposing of more money than I intend at present to do; I wish you to make some alterations; therefore, read it over again, item by item." D. M. did so, and made, by de-

An unexecuted will, referred to in a will subsequently executed, but not in the possession of the deceased, or read over to him, refused probate.

MARCH 15.
—
Usho, dec.

ceased's desire, the several alterations appearing in the paper. When he read the same again, as altered, the deceased said, "Well, that will do now, and I will think it over before I go to the Proctor, which I intend to do as soon as possible." On or about the 20th November, the deceased, accompanied by D. M., called upon Mr. B., a Proctor in Doctors Commons, and directed him to prepare a will for him, for which purpose he gave him instructions partly verbal, and partly contained in the paper C, and directed him to read over to him the whole of the instructions, and he then directed Mr. B., in preparing the will, to confine himself to four names written at the commencement, as those of the only persons to be benefited by his will, and stated that each of them was to take the sum written against his or her name yearly, and he then gave him the names of the persons who were to be executors. The deceased also left with Mr. B. three other testamentary papers, saying that he did not approve of them at all, and intended to dispose of his property in the way he had before stated. The deceased appointed to call again in about a week to execute the will. Mr. B. prepared the paper B, but neither saw nor corresponded with the deceased afterwards. In the early part of 1841, and in July following, the deceased informed J. W., a confidential friend, that a Proctor in Doctors Commons had prepared a will for him, but which he had not then executed, whereby he had given to some of his relations in Prussia annuities amounting to about half of his funded property. Early in 1841, and again in November, when J. D. B. was visiting him, the deceased told him he had given instructions to a Proctor to prepare a will for him, and that he had named him (J. D. B.) one of his executors, and had left his relatives in Prussia £60 a year, and told him (at separate interviews) that, as soon as his trial was over, he would go and execute his will, and dispose of the residue of his property. The trial did not come on so soon as he expected (namely, at the Summer Assizes, 1841, at Chelmsford), but was postponed till the ensuing Spring Assizes, after his death. The deceased did not allude to his will again till 26th December, 1841, when the Rev. A. W. R., his curate, and the aforesaid J. W., being

in company with the deceased, and knowing from previous conversations with him that a will had been for some time prepared for him in a Proctor's office, suggested to him, as he was then very ill, the propriety of his then making a will by which his instructions under such unexecuted will might be carried into effect. The deceased immediately acquiesced; upon which the Rev. A. W. R., having first asked the deceased whether his relative, G., should be his executor and residuary legatee, prepared a will for him (A), which was afterwards read over to and executed by the deceased, on the said 26th December, 1841, in conformity with the Act. This paper referred to the contents of his unexecuted will "in the hands of a Proctor." After the execution, the deceased said that the paper (A) contained his wishes in every respect. Upon his death, G. called upon Mr. B., the Proctor, at Doctors Commons, who delivered to him the papers B and C.

MARCH 15.

Usko, dec.

Jenner, D., moved for probate of the papers A, B, and C, **MOTION.** as together containing the will of the deceased, to be granted to the executors.

SIR H. JENNER FURT.—The unexecuted will (B) was never read over to the deceased; it was never in his possession; the instructions (C) were; but he does not refer to the instructions, but to a will in the hands of a Proctor, which had never been read to him, and he could not know, therefore, whether it had been drawn up according to his wish, it having been prepared partly from instructions and partly from verbal directions. [*Jenner.*—If the deceased had signed his name to it, that would not have carried the case further, as he was blind.] I cannot admit this paper to probate on motion—it may be propounded: it would be pushing the doctrine too far to allow a paper which had never been read over to the deceased, or been in his possession, to form part of his will. A paper of instructions is drawn up, altered, and approved, having been read over; the deceased then takes it to the Proctor, and gives him instructions partly verbal and partly written, and from that paper and those verbal instructions a will is prepared by the Proctor, and the deceased probably meant to execute it, but he never went to the

DECREE.

The unexecuted paper never read over to deceased nor in his possession.

MARCH 15.

Uako, dec.

Motion re-
jected.

Proctor to do so, and the will was never read over to him, and was never in his possession. He knew he had a will lying at his Proctor's, and he intended to execute it ; but it would be going a long way on *ex parte* affidavits to hold that paper, because it is referred to in the paper of December, 1841, to be sufficiently identified and incorporated with it, to enable the Court to admit it to probate. The party must propound the paper. I reject the motion in its present form.

Abbot, Proctor.

END OF HILARY TERM, AND THE SITTINGS
AFTER TERM.

EASTER TERM, 1842.

Prerogative Court of Canterbury.

APRIL 20.

IN THE GOODS OF RICHARD SIMMONDS, DEC.—*Motion.* A paper signed not in presence of any witness; the signature afterwards acknowledged in presence of one witness, who attested; subsequently acknowledged in presence of a second witness, who attested, in presence of the first witness, who did not then attest,—refused probate.

—The deceased died 19th March, 1842, a widower, with seven children. He left a will, dated 9th January, 1842, which appointed no executor or residuary legatee. This paper was signed by the deceased, no witness being present at the time. Afterwards he shewed it to his niece, who, having read it, requested it might be shewn to her aunt, A. R., which was done, and the deceased acknowledged his signature to Mrs. R. (the niece being present), who signed her name to the paper as to the execution of the will. Some days after (about the 9th February), the deceased shewed the paper to another person, W. L., to whom he acknowledged his signature, in the presence of Mrs. R. (who had already attested the execution), and W. L. at the same time attested it, by the deceased's wish. The question was, whether this was a sufficient compliance with the 9th section of the Act. The property was small.

Haggard, D., moved for administration with will annexed; but admitted that the case was so identified with that of *re Allen*,* that he could not press the motion.

SIR H. JENNER FUST.—There is the signature of the deceased made when no witness was present; there is then a subsequent acknowledgment in the presence of one witness, A. R., by herself; and afterwards an acknowledgment of the signature in the presence of another witness, W. L.,

* 2 Curt. 331.

APRIL 20. the first witness being also present at the time, and the second witness attests it at this time, but the first does not. According to the opinion I gave in the case of *Allen*, and which I still adhere to, this is not a due compliance with the Statute; because, although there was an acknowledgment to the two witnesses at the same time, there was not an attestation by two witnesses present at the same time. I consider that the acknowledgment of the signature in the presence of one witness, the paper being signed by her, and afterwards an acknowledgment in the presence of a second witness in the presence of the first, the second witness only attesting, is not a compliance with the intention of the Legislature, which is, that there should be an acknowledgment in the presence of two witnesses at the same time, and that both shall attest it. I must reject the motion.

Not a compliance with the intention of the Statute. Rejected.

Blackburn, Proctor.

Fraudulent mutilation of a will by an executor and trustee.—The Court not at liberty to exclude such party from the probate.

IN THE GOODS OF MARY ILETT, DEC.—*Motion*.—The testatrix died the 13th of February, 1839, leaving a will dated October 20, 1838, duly executed, whereby she bequeathed all her personal estate and effects to her two nephews, William and Mark Reeve, in trust to pay the interest of £500 to her niece, Elizabeth Brooke, for life, and on her death, the principal to William Brooke, her husband, and to pay legacies of £500 each to her two nieces, Mary Ann and Sarah Reeve; the residue to be divided equally between the executors. No application was made for probate of this will till the 14th March, 1842, when William Reeve applied for probate, and in the *jurat*, as originally drawn, he was described as sole executor, and the effects were represented as “under £600.” The paper appearing to have been mutilated, something having evidently been cut off at the bottom of the paper, the Registrars required an explanation of its condition, when it turned out that the bequest of £1,000 to the two nieces of the deceased had been removed from the will by William Reeve. Both executors then (17th March) appeared to take probate of the will, and the effects were sworn under £2,000. In the statement made by William

Reeve, to account for the mutilation of the will, he declared that, in a moment of irritation, in consequence of the testatrix having, as he alleged, promised to leave him the bulk of her property, he had cut off the bequest to the two nieces.

APRIL 20.

Hett, dec.

Pratt, D., moved for probate of the paper as it originally stood. MOTION.

SIR H. JENNER FUST.—This is a very gross attempt at fraud on the part of an executor. The will is kept back for three years, though Mark Reeve does not appear on the face of the proceeding to have had any concern in the intended fraud. By the paper, when offered for probate, it would have seemed that only £500 was disposed of, and therefore, there was no suspicion raised on the face of it that the property was more than £600, there being £500 bequeathed to Mrs. Brooke, and the residue would go to the executors, William Reeve and Mark Reeve. William Reeve now does not deny that he removed the two legacies of £500 each, which these young women, his own sisters, would have been deprived of, and which would have gone into the pockets of the executors, £500 into his own. I never saw a more gross and base attempt at fraud. He now swears that he did it in a moment of irritation, the deceased having promised him the bulk of the property; but there was an intentional misrepresentation of the amount of the effects, and there is an appearance of artfulness in the proceeding. I think a more base attempt at fraud was never made, and it was only prevented from succeeding by the precautions taken in the office, an affidavit being required accounting for the plight and condition of the paper. I have a very strong inclination to direct the papers to be laid before the Attorney-General, for his opinion whether or not the party should be indicted for an attempt to defraud, not only the legatees, but the revenue, as the duty would have been paid upon £600, instead of £2,000. I am afraid the Court has no power of excluding William Reeve from the probate and from the trust of which he is so unworthy; I am afraid I must decree probate of the paper to the executors.

A gross and base attempt at fraud.

Defeated by the precautions in the office.

Party cannot be excluded from the probate.

W. G. Clarkson, Proctor.

APRIL 20.

*An ambiguity
latens in a will
removed by pa-
rol evidence.*

THE DUKE OF DORSET v. LORD HAWARDEN.—*Act on Petition.*—The object of this petition was to obtain the opinion of the Court, whether his Grace the Duke of Dorset was the person intended to be named executor in the will of Mrs. Charlotte Leighton, of Shrewsbury, who died on the 26th of September, 1841, the will being dated 29th April, 1839. By this will, written by the testatrix, she purported to give legacies of £1,000 each to Lord Hawarden and "Lord Sackville," and to name as executors Lord Hawarden and "Lord George Sackville," in the following words:—"Also I give and bequeath unto my cousins, Lords Hawarden and Sackville, a thousand pounds a-piece, provided they consent to take upon themselves the trust of executors to this my last will and testament."—"And I nominate, constitute, and appoint the said Lord Hawarden and Lord George Sackville executors to this my last will and testament." It was admitted that the same person was intended by the descriptions of "Lord Sackville" and "Lord George Sackville;" but the question was, whether that person was the present Duke of Dorset (whose christened name is Charles), or his brother, the Hon. George Germain, who died in 1836, before the date of the will. The circumstances alleged on behalf of the Duke were these:—In 1770, his father, Lord George Sackville, took the name of Germain, and in 1782 was created Viscount Sackville. He died in 1785, leaving two sons, the present Duke of Dorset (who then became Viscount Sackville), and the Hon. George Germain, who died (as before stated) in 1836. In 1815, the present Duke succeeded his cousin, the late Duke of Dorset. The deceased had been acquainted with, and in the habit of meeting, the Duke and his brother in the early part of their lives, and the acquaintance continued, with intermissions, till 1800. In the latter part of her life, she lived in great seclusion, and it did not appear that she had had any intercourse with either of the brothers since 1800.

ARGUMENT.

Haggard, D., and Harding, D., for the Duke of Dorset.—This is a case of inaccuracy of description rather than of ambiguity, by the insertion of a wrong name. It is impossible that any other person could be intended than the Duke

of Dorset, who, though he had succeeded to this title before the date of the will, was still Lord Sackville, under which name the testatrix had known him, though she had mistaken his christened name. She could not have meant the Hon. George Germain (who had died three years before) under the name of Lord George Sackville. [Cases cited:—*Beaumont v. Fell*; * *Miller v. Travers*; † *Still v. Hoste*; ‡ *Rivers' Case*; § *Doe dem. Gord v. Needs*; ¶ *Bradshaw v. Bradshaw*; || *Wigram, On Adm. of Extrinsic Evid.*; ** *Phillipps, Ex.††*]

Addams, D., and Curteis, D., for Lord Hawarden.—This is a question of opposite probabilities; but it is far more probable that the testatrix intended that her executor should be the Hon. George Germain, who, she might have supposed, had, on the accession of his brother to the dukedom, become Lord Sackville, and she must have known that Charles Lord Sackville (whom she never could have known by any other name than "Charles") had become Duke of Dorset twenty years before the date of her will. [Cases cited:—*Doe dem. Hiscocks v. Hiscocks*; †† *Blundell v. Gladstone*; §§ *Doe dem. Smith v. Galloway*. ¶¶]

SIR H. JENNER FUST.—The deceased knew the present Duke of Dorset as Lord Sackville from 1785, when his father died, and it is shewn that she had a regard and affection for him, and spoke of him as "her cousin, Lord Sackville," whereas it is stated by one witness that she had very little acquaintance with his brother, though in another affidavit it is said that she had an equal regard for both brothers. It is clear, and is admitted, that one of these two persons must have been meant, and the question really is between the opposite probabilities,—as to which of them the designation most probably applies to, and, if parol evidence is admissible, what is the effect of that evidence.

Since the case of *Miller v. Travers*, the rule is, that "where an ambiguity or uncertainty arises on the face of a will, from applying the description contained in the will either to

* 2 P. Wms. 140. † 8 Bing. 244. ‡ 6 Madd. 192.

§ 1 Atk. 410. ¶ 2 Mees. & W. 149. || 2 Y. & C. 72.

** Prop. vii. 3d Ed. 1840. †† C. x. s. 1. ‡‡ 5 Mees. & W. 363.

§§ Not rep. ¶¶ 5 B. and A. 43.

APRIL 20.

Duke of Dorset
v. L. Hawarden.

APRIL 20. *Duke of Dorset v. L. Hawarden.* the thing devised, or to the person of the devisee, it may be helped by parol evidence." Here is a latent ambiguity as to the person, on the face of the will; the person named is "Lord Sackville," and "Lord George Sackville," and the party claiming is the Duke of Dorset, and the ambiguity arises whether he was the person meant. How far does the Duke of Dorset answer the description? In 1815, having succeeded to the dukedom, he dropped the use of the other title, of Viscount Sackville; and, though it is somewhat improbable that the deceased should not have known that he had become Duke of Dorset—and probably she did know it—the fact is, he had been known to her by the name of Lord Sackville. It is true, his name is "Charles," not "George;" but his father had been Lord George Germain. He answers very correctly to two of the descriptions, namely, the title, and the name "Sackville." But the christened name of "George" gives rise to doubt and ambiguity,—for I consider it to be an ambiguity, not an inaccuracy. What is it? His name is Charles. Probably he had never been called by the deceased by any name but "Lord Sackville." The other brother was known to her as the "Honourable George Germain," not as Lord Sackville, and it is more probable that she should have confounded the christened names of "Charles" and "George," than that she should have supposed—knowing that Lord Sackville was the eldest son of his father—that the Honourable George Germain had succeeded to the title of Viscount Sackville. Now, the Honourable George Germain answers to only one of the descriptions; he is not "Lord Sackville;" he is not "George Sackville;" he has not the name of Sackville at all; he has the name of George, and as it has not been suggested that there had been any intercourse between the deceased and him after 1800, she would still have known him as the Honourable George Germain.

I have not the least doubt or difficulty in coming to the conclusion that the Duke of Dorset was the person intended by the testatrix, notwithstanding he is called Lord Sackville and Lord George Sackville, though I cannot clearly account for this erroneous description. I am of opinion,

therefore, that, parol evidence being admissible in this case, to ascertain who is meant, that evidence is sufficient to satisfy me, both morally and judicially, that it is the Duke of Dorset, and I decree probate of the will to him jointly with Lord Hawarden. If the other party has any doubt of the correctness of this decision, it is competent for him to go before a Court of Equity, and contest the claim to the legacy; if I had decided the other way, I should have decided that the Duke was not an executor, and not entitled to the legacy as executor.

Proctors:—*Bowdler*, for the Duke of Dorset; *French*, for Lord Hawarden.

Consistory Court of London.

APRIL 22.

DILLON v. DILLON.—*Cause.*—This was a suit for divorce by reason of adultery, by Robert Crawford Dillon, D.D., against Frances Charlotte, his wife. The Libel, which was admitted without opposition, pleaded that the parties were married 26th November, 1839; that, on the 29th December, 1840, the wife went to Gravesend, in a steam-packet, on a visit to her mother; that, instead of going to her mother's house, she was met there by a male person, unknown, with whom she proceeded to the *Sir John Falstaff* public-house, at Gadshill, near Rochester, and passed the night with him; that this fact did not come to the knowledge of Dr. Dillon till 10th May, 1841; that, prior to that day, he had been told that his wife had committed this act of adultery, but he did not credit the statement till he went down to Gadshill, and ascertained that a person answering her description had slept there; that the landlord of that public-house had identified her, upon which occasion she endeavoured (in the presence of her husband) to induce the landlord not to identify her, privately pressing his arm, and saying, eagerly, "Say it was not me."

Suit for divorce by reason of adultery by the husband against the wife, not sustained, on account of insufficient evidence of identity, and the conduct of the husband.—A plea of cruelty, coupled with declarations of a desire to get rid of the wife, not admitted.

In Trinity Term, 1841, a defensive Allegation was
Defensive Allegation.

APRIL 22.
Dillon v. Dillon.

brought in on behalf of the wife, which denied the adultery, and pleaded an *alibi*, alleging that, on the day in question, Mrs. Dillon went to Gravesend, as pleaded in the Libel, but that she proceeded to her mother's house, and slept there that night and the subsequent nights. It further pleaded that, on the night of the 9th May, 1841, after Dr. Dillon had been informed of his wife's pretended adultery, he did not abstain from marital cohabitation; it counter-pleaded the implied admission to the landlord of the inn, and alleged, that the husband's affections had been alienated from his wife; that he was anxious to get rid of her, and frequently declared that he would get rid of her; that, in furtherance of this design, in June, 1840, he treated her in a harsh and cruel manner, applied opprobrious epithets to her, and struck her with his clenched fists; that he had endeavoured to prevail upon the servant (named Dicks) of Mrs. Dillon's mother, vouched to prove that Mrs. Dillon slept at Gravesend on 29th December, 1840, to say it was on the following night, and that, since the commencement of the suit (to wit, on the 30th May and 4th July, 1841), Dr. Dillon had visited his wife at Bayswater, where she lived, treated her in an affectionate manner, walked arm-in-arm with her, and admitted that he doubted whether he could succeed in the suit. The admission of this Allegation was opposed.

1841.
July 22.
ARGUMENT.

Addams, D., for the husband. The real purpose of this Allegation is apparent. The wife is to set up two sorts of defence; first, that there has been no adultery at all; secondly, a condonation. The charge of adultery must rest on the testimony of the witnesses to her identity. As to the allegation of cruel treatment by the husband, *cui bono?*

Cruelty no bar. Cruelty cannot be set up as a bar to this suit. The visits of the husband to the wife subsequent to the suit, if true, will be of no avail, unless they amount to condonation. It is extremely doubtful if any part of the Allegation be admissible; but it must be greatly reformed.

Nicholl, D., for the wife. The Court will look at this case attentively. The marriage took place no longer back than November, 1839. The husband, being then a clergy-

man of the Established Church, must have been of mature age; the wife was a minor. The whole charge of adultery amounts to this—that, on one single day, without any previous levity, or the slightest circumstance to raise suspicion; without any indication of familiarity or acquaintance with any individual; without knowing who the person was with whom she is charged with having committed adultery, one year after the marriage, she is supposed to have gone with a strange man, who was not on board the packet, but who met her at Gravesend, and slept with him at Gadshill. It is manifest that the only possible chance of meeting such a charge is by an *alibi*. The people of the inn had never seen the woman before: they might be mistaken. Dr. Dillon's non-cessation of cohabitation, on being told of the circumstance, is pleaded to shew that he had no confidence in his case, and the visits to Bayswater furnish similar presumptions, though not amounting to condonation. The harsh treatment is not pleaded in bar, but to shew that the husband would readily and hastily take up opinions adverse to his wife's character. His conduct towards Dicks was not subornation, but shewed a disposition to tamper with the witnesses. The whole of the Allegation is admissible.

APRIL 23.

Dillon v. Dillon.

Peculiarity of case.

Cruelty pleaded not in bar, but to shew animus of husband.

DR. LUSHINGTON.—Dr. Nicholl has very properly called my attention to the general circumstances of this case—not that it was necessary, for I have bestowed a serious consideration upon the papers. The facts on the face of the Libel are very peculiar, and such as to render it necessary for the Court to exert extreme vigilance.

JUDGMENT.

Libel sets up a peculiar case.

The marriage took place 26th November, 1839, and the parties, according to the entry in the register, were Dr. Dillon, a clergyman of the Church of England, and Frances Charlotte Rumball, minor, a spinster. I find the Libel pleads the marriage at once; no more is necessary; yet it is customary to plead it in a rather different form, and to allege a previous courtship: but there is not one word of this, and it naturally excites some observation where so accustomed a form is omitted. The charge is that, on the 29th of December, 1840, only one year after the marriage, the wife committed adultery with a person wholly unknown, and no

APRIL 22. *Dillon v. Dillon.* circumstances whatever are pleaded leading to the probability of the commission of the adultery as alleged—a single bare act of adultery, at one place. There is another circumstance stated in the Libel marked with a considerable degree of singularity. The adultery is pleaded to have been unknown to Dr. Dillon till the 10th of May, 1841; and that, when he received information of it, shortly before the 10th May, he did not credit it; but, acting as if he did, he went down to Gadshill, and made an appointment with the landlord to come up and identify his wife at the Polytechnic Institution, and on the 11th of May, the very next day, the Citation was served upon Mrs. Dillon. Dr. Dillon cohabits with his wife on the night of the 9th May, after he received the information. I will not discuss the question, whether or not a husband, waiting for credible information as to the misconduct of his wife, till he receives it, is at liberty to continue cohabitation; but I have no doubt that, when a husband has received information to which he could attribute such a specific degree of credit as that he could act upon it, although he is not bound to remove out of the house, he ought not to seek marital cohabitation with her. But it is not necessary to express any opinion on this part of the case; it is sufficient to restate my conviction, that the case on the face of the Libel calls for the particular attention of the Court.

Where a *prima facie* charge against wife, husband should not, during inquiries, seek marital cohabitation.

It has been stated that the charge pleaded in the Libel must rest upon the testimony of the witnesses examined in support of it, and that what is brought forward in contradiction is only for the purpose of delay, and of subjecting the husband to expense. But the Court cannot listen to arguments of this kind, which would almost amount to a subversion of justice; it can only look whether the facts alleged would, if proved, work any legal effect. According to one of the first principles of justice, a wife, or any person, in such a situation, has a right to counterplead a charge in a specific mode and form. Whether evidence can be adduced to establish the counterplea, the Court cannot conjecture; but there is nothing in the case to render it impossible; and I recollect a case, when I first came into

Court cannot shut out counterpleas, in specific form, on mere suggestion that they are vexatious.

the profession, where a lady was charged with adultery, and all the circumstances were stated with the greatest minuteness, and yet it turned out that the proof of identity failed, and the diversity was completely established.

APRIL 22.

Dillon v. Dillon.

With regard to that part of the Allegation which pleads that, after Dr. Dillon had received the information respecting his wife, he slept with her, which, it is said, is inconsistent with the denial of the adultery, and sets up a condonation; I apprehend that you may, in these Courts, make a double plea—deny the adultery, and at the same time plead that, if adultery was committed, it had been condoned.

A double plea allowable, though inconsistent.

With regard to the article which pleads the cruelty of the husband, I have thought it my duty to examine all the cases, to see whether cruelty had ever been admitted for any purpose whatever in cases of this description. In this case it is pleaded that Dr. Dillon was anxious to get rid of his wife; that he declared he would get rid of her, and that, in furtherance of such design, he treated her with cruelty. One argument for the admission of this article is, that it may have the effect of shewing that Dr. Dillon placed little reliance on the intelligence he received, or was ready to listen to charges against his wife, with a disposition to give them credit. Now I have endeavoured to ascertain whether such an article, pleading acts of cruelty, coupled with such declarations, had ever been admitted in a suit of this kind, and if not, the reason why such plea had been refused admission. I have found it laid down in more cases than one, that cruelty cannot be pleaded in bar to a suit for adultery; and, looking to my own argument, in *Harris v. Harris*,* I find I relied on the doctrine laid down by Lord Stowell in *Chambers v. Chambers*,† who stated as a reason for that doctrine, that the two offences of adultery and cruelty were of different kinds, and that on that ground there can be no compensation; and this, he says, is the general doctrine. I candidly say, that I entertain some doubt whether this reason is the most satisfactory that could be adduced, since, if the mere circumstance of the diversity of the nature of the offences were sufficient to work the effect, then, by parity of reason—

Plea of cruelty;

inadmissible in bar to a suit for adultery.

Reason assigned by Lord Stowell,

not apparently satisfactory.

* 2 Hagg. E. R. 92.

† 1 Hagg. C. R. 451.

APRIL 22. ing, adultery, committed by a wife, could not be pleaded in bar to her suit on account of cruelty—a doctrine which I am not aware has ever been entertained in these Courts. Perhaps *Dillon v. Dillon.* Other reasons. (to my mind) a more satisfactory reason would be, that, if the husband was guilty of cruelty before the wife committed adultery, she might have obtained redress by resorting to legal measures, and the personal ill-treatment she received could be no justification of a violation of the marriage-bed. Again, it may be, that, if such charges could be received in bar of adultery, a wife might be tempted to provoke that very cruelty of which she complained, with a view to cover the indulgence of her own licentious desires. I am neither at liberty, nor am I disposed, to depart from the general doctrine as laid down by my predecessors, though I do not mean, in stating the reasons assigned in support of it, to let it be understood that I adopt them. But the only question I am at liberty to consider is, whether such doctrine is applicable to the present case. I am bound to look at all the circumstances, which certainly are very peculiar.

How can charge of cruelty operate?

The point to which my attention is directed is this: in what way can the charge of cruelty, if proved, operate, so as to have legal effect? Dr. Nicholl has disclaimed the idea that it could be used in bar to the suit for adultery. Now if it be not admissible in that point of view, very great difficulties would arise; it would be an article setting up cruelty, not for the purpose of obtaining a remedy on account of the cruelty, or of barring the suit for adultery against the wife, but merely to throw a certain degree of suspicion upon the husband, as to whether he believed or discredited the charge against his wife. There would be the greatest possible inconvenience in so dealing with the case. The doctrine to be extracted from the cases appears to be this: that to bar a husband's suit against his wife for adultery, if adultery be not charged against himself, nothing is admissible save connivance on his part in his wife's adultery.

Conduct on husband's part calculated to induce adultery in wife, no bar *per se.* Conduct on the part of the husband calculated to induce adultery neither cruelty nor malicious desertion. Although cruelty and still more malicious desertion, have a strong tendency

to promote the commission of adultery by the wife, yet nothing can be clearer than that it has been established that such conduct is no bar to a husband's suit, and though I may think that that doctrine operates with some severity on the wife, yet my decisions have uniformly conformed to it, and it will be in the recollection of the Bar that I have done so in the recent case of *Morgan v. Morgan*.*

APRIL 22.
Dillon v. Dillon.

Now, is the principle at all affected by averring, in the present case, that the cruelty was in furtherance of an expressed design to get rid of the wife? Is such conduct thereby made to partake of the nature of connivance at the wife's adultery? I think not. By possibility, there might be a case in which the cruelty of the husband would directly lead up to the commission of adultery by the wife: I wish to guard myself against giving any opinion as to such an extraordinary case. Unless the conduct of the husband amounted to connivance, I think it could not go beyond malicious desertion, which more than implies a desire to get rid of the wife, for it is conduct carrying such intention, to a certain extent, into complete effect. I am bound to reject that part of the article; but with regard to the part which pleads the husband's declaration of a desire to get rid of his wife, which is of the nature of connivance, I admit that, as it may tend, besides, not improbably, to illustrate the true nature of certain points in the case which may be obscure, when the evidence comes to be considered. I look at the charge of adultery in this case with great suspicion. I want to have my mind satisfied that the husband believed it, and has brought a true case before the Court, and in order to sift the charge that the husband declared he was anxious to get rid of his wife, I admit that part.

Cruelty for express purpose of getting rid of wife, not connivance.

A possible case.

Plea of cruelty rejected.

Husband's declaration of desire to get rid of wife, admitted.

With regard to the communication with Dicks, I have no doubt of the admissibility of that part of the Allegation, and I must say that it is extraordinary that in this suit Dr. Dillon appears to take the matter into his own hands; he appoints the meeting at the Polytechnic Institution, and, after the commencement of the suit, he seeks and has an

The communication with a witness.

* *Ante*, p. 23.

APRIL 22. interview with one of the persons who may be examined in the cause.

Dillon v. Dillon.

Plea of intercourse with wife, subsequent to suit, admitted; its possible effect on the suit.

The articles pleading the subsequent intercourse with Mrs. Dillon are also admissible, and if true, nothing can be more inconsistent with his belief in her adultery; and it is doubtful whether Dr. Dillon is entitled to the aid of the Court, if it can be proved that, during the suit, he was having interviews with his wife, associating with her from time to time, and, although not cohabiting, was carrying on an amicable intercourse with her.

Allegation admitted.

The Allegation to be reformed and admitted.

The cause came on for hearing upon the two pleas and the evidence taken thereon.

1842.

Jan. 27.

Adultery proved.

Alibi has failed.

Addams, D., for the husband.—The marriage in this case was not contracted under very happy auspices, and could not lead to happy results. The witnesses prove that these parties lived in discord; but it is shewn that the violence of the wife's temper was the cause. The adultery of the wife is established beyond all doubt, and the pretended *alibi* has been attempted to be supported by wilful perjury. With respect to the charge of endeavouring to bribe a witness, the husband has not the means to bribe, if he had the inclination. His conduct towards his wife, since the suit, though indiscreet, had an object in view.

Conduct of husband prior to marriage.

Haggard, D., for the wife.—The husband has undertaken to prove that, at one particular time, and one particular place, on one solitary occasion, his wife was guilty of adultery. It appears on the cross-examination of one of the husband's witnesses, that, previous to the marriage, Dr. Dillon had seduced his present wife, who had a child by him when she was only 18 years of age. This being the manner in which he conducted himself towards her before marriage, it is not to be wondered at that they should not live happily, and the witnesses prove, not only their discomfort, but acts of violence by Dr. Dillon towards his wife, and his declarations that he was desirous of getting rid of her. There was not, however, the slightest suggestion that

he had the remotest idea of infidelity on the part of his wife, till May, 1840. The single act imputed to her is utterly improbable, and the testimony of the witnesses to the identity of Mrs. Dillon is most unsatisfactory, depending principally upon a defect in one of her eyes, which might have attached to many persons who came to the inn.* No inquiries are made as to the man. Dr. Dillon told one of the witnesses he had received letters about his wife; where are they? He says he had received a letter from a former friend of the gentleman who had been at the inn with his wife. Where, then, was the difficulty of finding him out, and of bringing an action against him? The result of the evidence of the mother and sister of the wife, the servant, and another witness, shews that Mrs. Dillon slept at her mother's house on the 29th December, and Dicks speaks to a person, whom she believes to be Dr. Dillon, coming to her and endeavouring to persuade her that it was on a Wednesday, not a Tuesday, when Mrs. Dillon came to her mother's house.

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Only a single act of infidelity imputed to the wife.

Defective proof of her identity.

The alleged adulterer not traced.

No action at law.

Proof of *alibi* complete.

* The Court, at this part of the argument, inquired whether there had been a Decree of Confrontation in this case? The Registrar replied in the negative. Dr. Addams said, it had been admitted in Acts of Court that the person seen by the witnesses, in the presence of the other party, was the wife of Dr. Dillon, and the party in the case, which was tantamount to a Decree of Confrontation. The Court doubted whether this was, under ordinary circumstances, sufficient in such a case as the present, unless there was a rule of practice to that effect, and referred to the case of *Searle v. Price* (2 Hagg. C. R. 187), where Lord Stowell held the proof of identity insufficient, in a case of nullity of marriage, a Decree of Confrontation having issued, but the evidence not being without doubt, though the party had acknowledged her identity. Dr. Addams.—“It appears from the minute in this case (11th June), that one of the witnesses present at the time of the acknowledgment was Mr. Wingate, who was at the marriage of Dr. and Mrs. Dillon, and gave the lady away.” The Court.—“I give no opinion. I concur with Lord Stowell, that, in a suit of nullity of marriage, even a Decree of Confrontation is not conclusive. All that we have here is, that the Proctor for one party produced a person as Mrs. Dillon before a Surrogate, in the presence of the other Proctor. It is only a point of practice: there is no doubt of the fact, and the defect, if defect it be, might be cured.” Dr. Addams.—“Mr. Wingate, on the 2nd Article, says: ‘Dr. Dillon and his wife being present at the same time when I and my fellow-witnesses were sworn in this Court.’”

APRIL 22. But, supposing the Court thinks the evidence in support of the Libel preponderates, the question remains, whether Dr. Dillon is not barred by his own conduct. He says he had been warned repeatedly by letter to watch his wife. Did he act upon those intimations? No. He has not told the Court when for the first time he became acquainted with his wife's infidelity; but there was a probable *causa scientie* on the 9th May, yet he did not abstain from nuptial cohabitation. There is no instance of a husband coming before the Court for relief who, after grave suspicion against his wife, continued to cohabit with her. Then, his conduct since the suit is compatible only with his belief that his wife was innocent—walking with her arm-in-arm, embracing her at parting, and deporting himself rather as a lover than as an injured husband. If this does not amount to a constructive condonation, it shews that the husband was not sensible that he had suffered any injury.

Feb. 15. *Addams*, in reply, on the point of forbearance, cited *Kirkwall v. Kirkwall*,* and *Elwes v. Elwes*.†

APRIL 22. DR. LUSHINGTON.—This is a suit brought by the Rev. Dr. Dillon against his wife, for separation, by reason of adultery; and certainly, since I have sat in this chair, I have never met with a case in which the evidence required more careful and painful investigation. On the part of the wife, the adultery is denied, and it has been further argued, that Dr. Dillon's conduct, after the discovery of the adultery, and during the progress of the suit, has been such as to bar him of any remedy, even if the charge of adultery should be sufficiently established. It is to these points that my attention must be directed.

Circumstances under which marriage was contracted. The marriage, it was truly stated by the Counsel for Dr. Dillon, did not take place under happy auspices, for it is proved by Mr. Wingate, a witness examined on behalf of Dr. Dillon, and his intimate friend, that, previous to such marriage, Dr. Dillon had seduced this young woman, then under twenty years of age, and had a child by her. When this circumstance was adverted to by the Counsel who argued in favour of the remedy for which Dr. Dillon prays, it was

* 2 Hagg. C. B. 277.

† 1 Hagg. C. B. 269.

observed, that, however reprehensible the conduct of Dr. Dillon might have been in this particular, the Court ought not, on that account, to visit him with punishment in this suit. Most clearly not, and I wholly disclaim both the intention and the power to do so; and further, a marriage under such circumstances is in itself commendable; for it is making all the reparation in the power of the individual for the injury he had already done. What occurred between the parties previous to marriage never ought to be allowed to operate as a justification to Mrs. Dillon for infidelity after marriage, nor form a bar to Dr. Dillon's claim for redress. Still, in a case like this, these facts may not be altogether without a legitimate bearing; for I apprehend that a husband contracting a marriage under such circumstances is bound to exercise a more than ordinary degree of care and circumspection, to prevent his wife from again deviating into that path of vice, into which he was the first to lead her. It would, however, be going much too far to say that, because the marriage was contracted under such circumstances, the husband could have intended, *a priori*, to break the tie, by conniving at the adultery of his wife.

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The cohabitation was of no long continuance, and there is not much evidence to shew on what terms they lived during the cohabitation; so far as appears, not happily, and Mr. Wingate states that Dr. Dillon frequently complained to him of her absenting herself from him: under what circumstances there is no evidence to shew.

The charge of adultery is contained in the 4th and 5th articles of the Libel, and it is necessary that I should advert to them with particularity. It is alleged that, on Tuesday, the 29th December, 1840, Mrs. Dillon went to Gravesend, for the ostensible purpose of paying a visit, for several days, to her mother, Mrs. Drury, residing at or near Gravesend; for this visit she had solicited and obtained the consent of her husband, who accompanied her to Blackwall, from whence she went by a steam-packet, as if for the purpose of going to her mother's house: that, at some time previous, Mrs. Dillon had formed a lewd and adulterous intercourse with some man, whose name is unknown: that, on the ar-

The facts.

APRIL 22. rival of the steam-packet at Gravesend, Mrs. Dillon was met and joined by the said man, and shortly afterwards proceeded with him, in an omnibus, or public conveyance, to the *Sir John Falstaff* Inn, at Gadsbill, where they spent the evening and slept together, and committed adultery: that on Wednesday the 30th, they left the inn, in an omnibus, for Gravesend, on which occasion she stated to the chambermaid, while assisting to dress her, that she had a mother living there, whom she was going to visit.

No circumstances leading up to the adultery.

The first observation which naturally occurs on reading this statement is, not only the total absence of all preliminary circumstances leading up to and rendering the adultery probable, but the entire absence of all explanation why no such evidence was given. In most cases, it is true, adultery is clandestine; but it is equally true, that where the parties are cohabiting together, in the great majority of cases, evidence after the discovery of the fact is produced to shew that such fact was probable. In the common and ordinary course of things, the previous circumstances come to light, and are pleaded and proved. This is a species of evidence which the Court always looks for, and indeed requires, when circumstances will allow of its production. It was more than once observed by Lord Stowell, that the Court looks with extreme jealousy on cases where the fact of adultery alone is pleaded, and all the circumstances rendering the adultery probable are entirely omitted. He said, and truly, that it was to these circumstances the Court looked, as tending to shew whether the fact was probable or not. Upon the present occasion, all such evidence is wanting, and it was, indeed, only by cross-examination of Mr. Wingate that it accidentally came out that he was told by Dr. Dillon that Mrs. Dillon had been in the habit of absenting herself—as to how often, under what circumstances, what means Dr. Dillon had adopted to check such habits, bound as he was to have exercised the control of a husband, well knowing that he had not married under ordinary circumstances—with respect to all these important facts, the Court is left wholly in the dark. That such evidence, assuming the facts to be as stated by Dr. Dillon, might have been given, I have

no doubt, and, being so far purposely kept in the dark, I am bound to take especial care that in my view of the further facts I walk in the light. APRIL 22.
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To proceed with the adultery on the 29th December, 1840: it is not proved by any evidence that Mrs. Dillon was met at Gravesend by any man whatever; but it is agreed on all hands that she did go to Gravesend on the afternoon of the 29th of December, 1840, with Dr. Dillon's permission; she is, therefore, shewn to be in the vicinity of Gads-hill, where she is alleged to have committed adultery, which is not an unimportant fact. If the three witnesses examined on behalf of Dr. Dillon to prove the adultery be not grossly perjured, some man and woman slept at their house either on the night of the 29th December, or about that time; which fact, taken to be true, brings this part of the case to a question of identity. Proof of the
facts.

With respect to the particular day when the occurrence took place at the *Sir John Falstaff*—and of course it is a very important point in the case—I should place but slight reliance on the accuracy of the memory of witnesses, unless there were some peculiar facts which enabled them naturally and probably to fix the time; and certainly it does appear to me that the fact spoken to of a ball that was to take place on the 31st of December, the last day of the year, was one that reasonably tended to enable the witnesses to fix the time; nor do I think that the accuracy of Mr. and Mrs. Wilson (who kept the inn) is affected by the circumstance of the servant-maid believing that the day was two nights before Christmas Day, and not New Year's Day: it is a very natural mistake by the witness, and not such a discrepancy as would induce me to entertain any doubt as to the accuracy with which the witness had fixed the day, or the probability of the fact making due impression on her mind.

With regard to the identity of the person—I am now speaking of the power of the witnesses to depose to the identity of the two parties who slept at the inn on the 29th December, which I think would very much depend upon their means and opportunities of seeing the persons, and Evidence of
identity.

APRIL 22. whether their attention had been called to their appearance
Dillon v. Dillon. —with regard to the identity of the person, I think that Mr. Wilson, who attended the parties at tea, and again in the morning at breakfast, had such opportunities as might enable him to speak to the identity with reasonable certainty: I say "reasonable certainty," because, in all common cases, I am of opinion that an inn-keeper is not the best witness as to the identity of a guest whom he sees but once. This is obvious on the slightest consideration; because, from the habit of seeing a very considerable number of strangers, unless some particular fact called his attention to the person or conduct of any individual, he was not likely to retain any very fixed recollection of their persons. But, upon the present occasion, there was, as stated by the witness, the additional and particular fact of the lady having lost one eye, or, at least, that it was visibly affected; and also the particular fact, that the person who accompanied her, again came to the inn in April or May afterwards, and, as Mr. Wilson has sworn, spoke of bringing the lady there again. The maid-servant, Frances Goff—for all the evidence, as I have said, comes from these three witnesses, Mr. and Mrs. Wilson, who kept the inn, and Frances Goff, the servant at the inn—had still more ample opportunity, according to her own account, of ascertaining the identity; for she not only waited on the parties, but assisted the lady to dress and undress; and she further states that, upon seeing her in the steam-boat as she was going to town on the 10th May, she immediately recognized her. It is unnecessary to travel through the evidence as to the mere fact of adultery, because, as I said, unless these witnesses are grossly perjured, it is clear that the two persons did sleep together in one bed at the inn at Gadshill. In the Libel it is stated that the person (whoever she may have been) who slept there, told the chambermaid, while she was assisting to undress her, that she had a mother living, whom she was going to visit. But the evidence of the servant goes further—that she not only stated that she had a mother living at Gravesend and was going to visit her, but that she had not seen her for eight or nine years, and it has been contended that this is as inconsistent with her being

Mrs. Dillon as the other part is consistent ; and it is hardly fair to plead in the Libel only part of the statement, leaving out what has as much effect and operation the other way.

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Now, though the adultery here charged is limited to one occasion only, and although there are no circumstances either preceding or succeeding it to throw any light upon the case, yet I feel bound to say that there can be little doubt that, though the *onus* of proof is by the law and justice thrown upon the accuser, there is, *primâ facie*, sufficient evidence of the adultery and of the identity.

Sufficient evidence, *primâ facie*, of the adultery.

Before the Court, however, can arrive at the conclusion that the fact of adultery is sufficiently established, and also the identity, not only must the evidence adduced to establish the *alibi* be duly weighed, but many other most important and peculiar circumstances ought to receive the most grave consideration, before the Court can safely arrive at a determination whether or not the facts are sufficiently proved, and whether or not Dr. Dillon is entitled to the divorce he prays.

The evidence, with regard to the *alibi*, consists of the testimony of four witnesses, Mrs. Drury, the mother of Mrs. Dillon, who at the time resided at Gravesend ; Janet Rumball, her daughter ; Emily Dicks, and Elizabeth Lloyd. They have been examined to prove that Mrs. Dillon was at Gravesend, and slept there, on the very night in question, the 29th December, and consequently that she could not have been at the *Sir John Falstaff*. Now as to two of these four witnesses, their connection with the party accused (one being the mother, the other the sister) would induce the Court to watch their testimony with great vigilance ; but neither principle nor authority would justify me in saying that, on that account alone, they ought to be denied all credit ; for nothing can be more absurd than to hold that a person standing in the relation of mother to the accused, is incompetent to be examined as a witness, or that no credit should be given to her when she deposed to facts. The case comes to this, as was stated many years ago by Sir John Nicholl : when you examine a witness nearly connected with the parties as to facts, not as to matter of opi-

The *alibi*.

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Dillon v. Dillon

nion, such witness is entitled to be believed. Then if Mrs. Drury, Janet Rumball, and Emily Dicks, the servant, be believed, it is manifestly impossible that Mrs. Dillon could have been at the *Sir John Falstaff* on the Tuesday night. Elizabeth Lloyd would not establish the fact with the same certainty, for she speaks only to Mrs. Dillon's being at her mother's at six o'clock, and therefore it was possible that Mrs. Dillon might have reached the *Sir John Falstaff* before eight: the time when the two persons got there is left by the three witnesses (Mr. and Mrs. Wilson and Frances Goff) extremely loose, but I think it may be taken that they arrived at the *Sir John Falstaff* between seven and eight o'clock. But the evidence of Elizabeth Lloyd is of considerable importance, for it tends strongly to corroborate the testimony of Mrs. Drury, Janet Rumball, and Emily Dicks, as to her having been at the house at Gravesend at all. Looking at the contradictory nature of the evidence, it is clear

Credit of the
 witnesses an
 important
 question.

that the credit of the witnesses is one of the most important of the questions for the Court to consider and determine. As to the credit of these four witnesses, the manner in which they have given their evidence, and the probability of the reasons which enable them to fix so positively on Tuesday night, are circumstances which must guide the judgment of the Court.

I must here observe, that the fact of its being admitted that Mrs. Dillon did go to Gravesend, with the consent of her husband, on the 29th December, and for the purpose of paying her mother a visit, takes away all improbability of her being at her mother's on that day, in the same degree that it adds to the probability of her having been at the *Sir John Falstaff*: it is equally consistent with either alternative. However, it has this additional bearing: that the fact is in unison with the evidence of Mrs. Drury, when she states that she had written to and expected her daughter during that week. Upon a very careful consideration of Mrs. Drury's evidence, I do not feel justified in saying, that it is either marked by circumstances of gross improbability, or given in a manner so palpably inconsistent with truth, as to deprive it of all title to credit. She is confirmed as to almost

all her reasons for being certain of the day by her daughter, Miss Rumball, by Elizabeth Lloyd, and by Emily Dicks. I do not think it necessary, and it would prolong my judgment to an inconvenient length, to follow minutely the various circumstances; but they appear probable, and are spoken to by all the other witnesses, as well as by herself.

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Now Elizabeth Lloyd is, so far as appears here, as credible a witness as any one who has been examined in the cause; she does not attempt to go beyond the fact which was in her own knowledge. She simply states, that she had been engaged to go that evening to sleep at Mrs. Drury's, for the purpose of making a dress next day, and she does not attempt to carry down the presence of Mrs. Dillon at the house of Mrs. Drury a moment longer than six o'clock in the evening. If she had been a forward witness, and produced for the express purpose of establishing the fact of an *alibi* satisfactorily, it was to have been expected that she would have gone further. Now as she confines her evidence to a fact within her own knowledge, she states the reason why it impressed itself on her mind. I will first observe, that the circumstance of Thursday being New Year's Day is a fact common to both sides, as a mark by which to fix the particular day, as well to one set of witnesses as the other. What were the circumstances which occurred to her on Tuesday evening? Not simply that she was disappointed of sleeping at the house, and did not sleep there, but that she was forced, at six o'clock, in a night of December, to go back to Northfleet, having no other place to sleep at. I think that was a fact calculated to make an impression on her mind.

Now let us try the evidence of Emily Dicks. There is nothing in her evidence to induce me to say that she is a less credible witness than Frances Goff, the servant at the *Sir John Falstaff*; they were both in the same situation of life, and Emily Dicks had quitted the service of Mrs. Drury before the discovery of the alleged adultery, and when she was examined, she was living at the house of another person, and was not under the control of Mrs. Dillon or her mother. Her reasons for fixing the day may not be apparently so

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cogent as those which operated on the minds of Mr. and Mrs. Wilson; but there is no improbability in them, and there is no appearance in her evidence of deliberate falsehood or fiction. To her the circumstance of being promised a holiday the day before New Year's Day, and losing it by the arrival of Mrs. Dillon, is a fact by no means likely to escape her memory. Her statement, too, of her interview with Mrs. Dillon, on the 10th of May, is consistent with itself, and with the evidence of Janet Rumball. I am now alluding to what took place on the 10th of May, when Mrs. Dillon went down for the purpose of seeing this girl, and Janet Rumball has been closely cross-examined as to what took place, and so has Emily Dicks, and they had to give very detailed evidence as to what occurred, and they are both altogether consistent in that evidence, and it is impossible that it could have been concocted by two such witnesses; they could never have met a cross-examination, such as has been applied to them, by any previous concert.

The husband's communication with Dicks, not proved.

Now I am bound to say that there is one fact deposed to by Emily Dicks (I am now considering her credit) of a very startling description; I refer to her evidence on the ninth article. She states, that, subsequently to the 10th of May, Dr. Dillon did come to her; did question her as to the day Mrs. Dillon came to her mother's, and did endeavour to persuade her to say that it was on the Wednesday. She states that, at the time of the first interview, she mentioned it to her mistress, and that the person returned a second time. The reference to her mistress certainly tends to shew that some one at least so visited her; but I thought it my duty to look at the answers. Dr. Dillon there positively denies that he ever had any interview with this witness at all. Now upon her sole testimony as against Dr. Dillon, in this particular opposed by his answers, I think I should not be justified in imputing to Dr. Dillon the attempt to induce this witness to depose falsely; but though I do not impute to Dr. Dillon the offence of endeavouring to pervert the evidence to be brought before the Court, yet, on the other hand, I should be wholly unjustified in imputing to this witness that she has wilfully told an untruth. The principle

which I have acted upon in considering this evidence is very analogous to that which is acted upon in a Court of Equity, where a single witness deposes to a fact, which fact is distinctly denied in the answer of the other party; and though I do not say that those principles could always be carried out in these Courts, and indeed they ought not, yet I think, in a case of this great difficulty, it is justifiable to resort to that principle, and that I do equal justice between the parties when, on the one hand, I disclaim imputing to Dr. Dillon any culpability with regard to the witness, and on the other, do not fix upon Emily Dicks the charge of having told a wilful falsehood.

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Now this is the evidence of these seven witnesses. I fear that, in looking to other parts of the case, it would be indispensably requisite to advert to other parts of their testimony which would have a bearing also on the question of credit. But I have now considered the evidence of these seven witnesses as to the great point in dispute; viz. as to where Mrs. Dillon slept on the night of the 29th of December; and I am compelled to say that, on whichever side the truth may be, on the examination of the evidence of these witnesses, so far at least as I have hitherto gone, I find myself placed in this painful predicament: I do not find sufficient to enable me to say that either party has been guilty of wilful perjury; and if mistake there be by either, it is certainly as difficult to be accounted for. In such a case, it behoves the Court to proceed with great caution; and, therefore, I shall now address myself to the other points arising in this case.

Result of the evidence on the *alibi*.

There are two points to which the evidence in a great measure equally applies, and I shall deal with them together; the conduct of Dr. Dillon before and after the discovery of the alleged adultery; what took place, as regards the witnesses; as regards his wife; and with regard to the unknown adulterer. Some observations as to the credit of the witnesses will incidentally fall in under this view.

On other points.

The evidence as to the manner in which the adultery first came to the knowledge of Dr. Dillon is given by Mrs. Wilson on interrogatory, and the truth of that statement cannot be denied, without impugning the veracity of one of the

As to the conduct of the husband, previous to the discovery.

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principal witnesses examined on the behalf of Dr. Dillon. I will not advert to the other alternative, or to the supposition that Dr. Dillon has wilfully mis-stated the truth. Now what are the facts established by Mrs. Wilson's evidence on interrogatory? Having first said that Dr. Dillon had called upon and questioned her, she says: "My husband was the only person present on that occasion. Dr. Dillon stated that he had been repeatedly written to about his wife, to watch her movements; that he paid no attention to the letters he received about her, till he received one from a friend of the gentleman who had been with her at our house, and who had quarrelled with the said gentleman, stating that his wife and the said gentleman had slept at our house on the said 29th day of December." The witness further says, that she did not know who the man was; that Dr. Dillon said he did not know the man himself, but that he had been told that he was the son of a solicitor, living at No. 3, somewhere, at a place which Dr. Dillon mentioned, in Lincoln's-Inn. Now what did Dr. Dillon do upon this? That which is not prudent in any case, and still less in one like this. He undertook the investigation in person, and going down to the inn, there saw the two principal witnesses. This happened some days before the 10th of May; he went down twice between the beginning of May and the 10th. Mrs. Wilson states that, on Mr. Wilson observing that the lady had something the matter with one of her eyes, Dr. Dillon said, "It is my wife," and was much affected. Pursuant to an arrangement then made, Mr. Wilson proceeded to town on the 10th of May, and met Dr. and Mrs. Dillon at the Polytechnic. The conversation which took place was somewhat singular. The previous facts which I have mentioned must be borne in mind. It was for the purpose of identifying this lady that Mr. Wilson so went to the Polytechnic; and he says, "having observed Dr. Dillon sit down with his wife in a less frequented part of the room, and having immediately recognized her, I went up and said, 'Good morning, Ma'am; I hope you are better. Mrs. Wilson and myself thought we should have had the pleasure of seeing you at Gadshill again before this. Your good gentleman was at our house a short

time since, and said he should bring you down again, as he thought it benefited your health.' " Now it does appear to me, that this was a rather singular mode of addressing her, and it proves at least one fact, that this gentleman—this unknown gentleman—who, as appears from other parts of the evidence, had been at the house subsequently, and as I think pretty clear, many times before, though still unknown—had used, according to the statement of this witness, an expression denoting his intention to revisit the inn. But what said Dr. Dillon? " Dr. Dillon and his wife then stood up, and he questioned her about what I had said to her; addressing her by her Christian name, which I do not now remember, ' My dear,' says he, ' what does this mean? Your good gentleman—what does this mean?' " Why Dr. Dillon knew all this; he was perfectly cognizant of it; he had received the letter; he had seen Mr. and Mrs. Wilson. I cannot help saying that what followed appears as if he was ignorant of the identity. " ' What does this mean—your good gentleman?' Addressing me, he said, ' I am this lady's good gentleman.' " Surely Mr. Wilson knew that before; it was a very gratuitous piece of information. " I am her husband—was it I who was with her at your house?" Certainly, that was a fact in his own knowledge. " I told him no, and he proceeded to question me farther as to his wife, and as he was so doing, Mrs. Dillon squeezed my arm. I continued, however. He appeared very much cut up, and putting his hand to his forehead, he turned round." Why if he had been with the witness before, certainly it was somewhat singular that he should conduct himself in the manner stated.

Now the reason why I advert to this is, because of the predicament in which the Court is placed, where an individual undertakes to conduct his own case. What it has a right to expect is, that some person, whose integrity and impartiality could be relied on, should have been employed to conduct the case, and sift these witnesses, not the party himself. I must not, however, though very much struck by the detail of this conversation, take a one-sided view of the evidence. This is distinctly sworn by Mr. Wilson, of whom

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APRIL 22. I have already said I know no reason why he should not be entitled to credit,—and it is a fact of the greatest importance in this case—that Mrs. Dillon, by urging him to silence, in effect admitted her identity; because it is impossible, *primâ facie*, that, if she was entirely ignorant of the whole of this transaction, she should not have utterly disregarded all assertions to the contrary made by Mr. Wilson; and certainly she would not have endeavoured to silence him in the manner deposed to by Mr. Wilson. It is a very strong circumstance, but it is deposed to by a single witness.

Conduct of
the husband on
learning the
adultery.

What occurred then? On this same 10th day of May, the day of this very interview, Mr. Wilson comes to Doctors' Commons, and is examined by the clerk of the Proctor in the cause. Was this in pursuance of a previous arrangement or not? If all this was done by previous arrangement (as is most consistent with probability), it is very difficult to account for, and not altogether consistent with, the surprise expressed by Dr. Dillon, and other parts of his conduct. Is it possible that, if he had made a previous arrangement with this witness to come here and be examined by the Proctor—if Dr. Dillon was so satisfied of the guilt of his wife—he should have expressed himself with all the emotion stated by Mr. Wilson? It is quite impossible. On the 10th May, Dr. Dillon takes his wife to her mother's at Bayswater. On the 11th, Mr. and Mrs. Wilson and Frances Goff come to town by the steam-vessel, from Gravesend, and on board that vessel Mrs. Dillon is recognized, who, as it appears, according to her own witnesses, had, on the afternoon of the 10th May, gone down into Kent to see Emily Dieks. On the same day (the 11th), Dr. Dillon had been joined by his wife, and on that day, after her return from Gravesend, in the presence of Dr. Dillon—a circumstance, I believe, almost unprecedented—the Citation is served upon Mrs. Dillon, Mrs. Wilson and Emily Dicks being also present. Frances Goff says that, as soon as it was served, Mrs. Dillon walked away with her husband.

Before I comment upon these facts, I will follow the evidence to its conclusion. After the suit commenced, it is

proved that Dr. Dillon, while the cause was going on, had two interviews with his wife, on the 30th of May, and on the 4th of July. They took place in the evening, and lasted no inconsiderable space of time; for, taking the fair medium between the witnesses, it appears that they lasted three or four hours, and did not terminate till twelve at night. It is sworn by three witnesses that they walked away arm-in-arm, and one witness says, they shook hands at parting. A conversation is spoken to by Mrs. Drury, to which I should have paid more attention had it been deposed to by more witnesses than one, or by a witness not so closely connected with one of the parties: as it stands, I do not feel safe in relying upon it.

Having stated briefly the evidence as to the facts, I must now consider their weight and bearing, in connection with the evidence as to the adultery. This is no ordinary case, and in many respects the observations common to cases of adultery do not apply to this. My judgment will be founded on no isolated part of the case, but on all the facts combined. I say, it is no ordinary case, for many reasons, especially because, as I have already observed, in a case where the husband seeks to be divorced on account of adultery from the wife whom he himself first seduced, he must expect to have his whole conduct examined with a much more rigid scrutiny than would be applied to the conduct of a husband where no such fact existed. In such circumstances, the husband is bound to exercise greater vigilance; he paved the road to her first fall, and he ought to take care that he did not smooth the path to her second. Dr. Dillon has furnished no evidence as to the terms of their matrimonial cohabitation. I do not place much reliance upon the evidence of his two servants, that he frequently declared he wished to get rid of his wife; but it is fair to judge by the testimony of his own witness, Mr. Wingate, who states that Dr. Dillon and his wife did not live on happy terms, nor were circumstances wanting to excite his vigilance; that in the early part of 1841, Dr. Dillon declared that it was impossible they could live together much longer, and he stated, as one reason, her violence, and her "absenting herself from

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Application
of facts proved,
to the adultery.

Husband's
conduct in this
case to be rigid-
ly examined.

APRIL 22. home." Now this fact (for it must be taken as a fact, as he is Dr. Dillon's own witness, and his intimate friend) ought, considering the connection before marriage, the disparity of years, and the terms they were on, to have excited his vigilance, and led to some steps for the preservation of her honour and his own. But nothing whatever appears to have been done, and nothing having been done, I do not think I express myself too strongly when I say that, in a case like

Absence of this, the absence of due precaution is criminal negligence, and although the absence of all precautionary measures might not alone determine the judgment of the Court, yet it is an important ingredient in the case, combined with other facts.

He had received information by the husband, is criminal negligence. But I must look to the next step. Mr. Wingate speaks to the information Dr. Dillon said he had received of his wife's adultery: "He had been repeatedly written to about his wife, to watch her movements, but he paid no attention to the letters he had received." This is Dr. Dillon's own account to his own witness. He had complained to Mr. Wingate, at the beginning of the year, of her frequently absenting herself, stating this as likely to lead to a separation, and yet it is not even alleged that he did any one thing to prevent the consequences which, according to all probability, were likely to result; he receives actual warnings of the danger, and he utterly disregards them. Again, what does Dr. Dillon do after his two interviews with Mr. and Mrs. Wilson? He continues to cohabit with his wife up to the morning of the 10th of May. Was this justifiable conduct? Is it sanctioned by the principles laid down in these Courts?

Doctrine of Oughton,* on the causes which prevent separation, though these Courts. adultery has been committed, says, that if the party accused shall have alleged and proved that the party proceeding had knowledge *saltem probabilem criminis commissi*, and continued to cohabit, that is condonation. Then he says what the *probabilis scientia* is—if the witnesses have signified to the party that they could depose to the adultery *ex propriis eorum visu et scientia*.† Here the husband had received a

* Tit. 214.

† "Probabilis scientia dicitur si maritus suspectam habens uxorem de adulterio, eam de eodem accusaverit, et illa hujusmodi crimen confessa

letter informing him of the adultery at Gadshill; he had heard from the witnesses what they have since deposed to; he had declared that the person must have been his wife, and yet he still continued his cohabitation. APRIL 22.
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In excuse for Dr. Dillon's conduct, the case of *Elwes v. Elwes* has been cited, or rather a *dictum* of Lord Stowell in that case, for there the condonation was not pleaded, nor the *probabilis scientia* proved; on the contrary, Lord Stowell said that there was not the slightest evidence that the husband was cognizant of his wife's adultery. To a *dictum* of Lord Stowell I am disposed to pay the greatest deference. "A husband," he observes, "has suspicions; he has some intimations; he has enough to convince his own mind, but not to instruct a legal case. In that distressing interval, his conduct is nice, and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated, and if he continues cohabitation, it then becomes liable to that species of imputation which has passed to the disadvantage of this gentleman." But it appears to me that this *dictum* applies to a case wholly different from the present—to a case where there is not actual evidence of a direct fact of adultery, but of circumstances rendering it probable. In *Timmings v. Timmings** (a case also, as must always happen, greatly differing in its circumstances from this case) Lord Stowell expressed himself very strongly as to the necessity of the husband shewing, though condonation was not pleaded, that he had not slept with his wife on the 12th January, the adultery having been discovered on that day, and she was not sent from the house till the 13th. The observations of Lord Stowell in that case are extremely strong. It is true that, in this case, on the 9th, Wilson had not had a personal interview with Mrs. Dillon; yet all the other circumstances to give credibility to the charge were well known, and I

fessa fuerit; vel testes illi quos maritus in iudicio contradictorio ad probandum adulterium objectum produxit, significaverint marito, ante litem institutam, se posse deponere ex propriis eorum visu et scientia de huiusmodi adulterio; vel si maritus uxorem suam in ipso actu adulterio deprehenderit."—*Ordo Judic.*, tit. 214.

* 3 Hagg. E. R. 76.

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cannot but think that it is very difficult to escape from one of these conclusions—that Dr. Dillon did not give credit to the story, or that he was very reckless whether he cohabited with her after the adultery or not: the facts, I think, shew the latter to be the more probable conclusion.

I have thought it my duty not to allow this point to pass by without particular notice, because I hold that the principle so laid down by Oughton ought not to be relaxed; at the same time I am very ready to allow, in conformity with the *dictum* of Lord Stowell, in *Elwes v. Elwes*, that there are many circumstances in which the principle could not in justice be applied with literal strictness; nor should I be disposed to hold in the present case, were this the only circumstance unfavourable to Dr. Dillon, that such circumstance alone would bar the divorce.

The husband's interviews with the wife since commencing the suit.

The next point I am called upon to notice is that of his being with his wife at the period of serving her with the citation, and I must say it appears to me a very unbecoming proceeding. Then, during the pendency of the suit, Dr. Dillon had two long interviews with his wife. I am bound to observe that I have great doubts whether the Court, had the fact been brought to its knowledge, could have permitted a case to proceed where, pending a suit on account of his wife's adultery, the husband, for reasons not only not explained, but kept back from the Court (for I have looked into his answers, and he has declined to answer why the interviews took place), is alone with his wife, at interviews sought for by himself. I do not see why any of the facts should be kept back from the knowledge of the Court. In former times, strong doubts were entertained whether a solicitor was protected from disclosing what he knew in such a case; but surely it does not lie in the mouth of a husband to say that he will not afford the Court any explanation of circumstances which require it.

No action at law.

There still remains one point of no small importance to the final determination of the case. There has been no action at common law; the alleged adulterer remains undis-

No evidence as to the alleged adulterer.

covered, and no evidence has been produced to shew that any attempt had been made to discover him, or to account

for the extraordinary darkness in which this part of the case is enveloped. In argument, indeed, it was said that Dr. Dillon's finances would not allow of the production of such evidence on these points; but how can I with justice listen to that argument, which would go to shew that, in a case highly penal to the party proceeded against, I ought to dispense with that evidence which, in ordinary cases, would and ought to be produced?

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First let us consider the facts, and then the demands of the law. Here are letters, giving important information as to the adultery, and these letters are withheld from the Court; letters written, too, if the story be true, by one who must have known all that had taken place. Dr. Dillon is told that the person (the alleged adulterer) is the son of a solicitor, and even the number of his residence in Lincoln's Inn had been disclosed to him, and the same individual knew the house at Gadshill, and must have been there before the 29th December, 1840, and he was there afterwards, drinking tea with the landlord and landlady (according to their evidence) in the parlour. How is it possible that I can believe, against this strong presumption, and without evidence, that this individual could not be traced out, identified, and an action brought against him? The withholding of evidence of this kind is strongly commented upon by Lord Stowell, in *Timmings v. Timmings*; but in the present case, this evidence is of ten-fold importance—important as regards the *bona fides* of the whole case; as affecting the question of identity—the great question in dispute; as preventing a *vivâ voce* examination, which, in such a case as this, is almost indispensable to the discovery of the truth. In an ordinary case, proceedings at Common Law are not necessary, and are often unimportant, nor ought the result of an action to affect the decision of this Court, for a verdict may be procured on evidence not admissible against the wife—as the admission of the adulterer, not in her presence; or the verdict may be against the plaintiff, as in *Loveden v. Loveden*,* because at Common Law evidence could not be received which has been held here admissible

The fact of great importance to question of identity.

* 2 Hagg. C. R. 51.

APRIL 22. against the wife. So it may be in ordinary cases; far otherwise in this, where the identity of the adulterer and the withdrawal of the evidence as to the adulterer, and of the witnesses from a *vidé voce* examination, become of paramount importance to the elucidation of truth, especially as to the identity of the wife. It is quite manifest that, in a case of contradictory evidence, the confronting of witnesses, and their cross-examination on the facts and circumstances as they arose, would have thrown infinitely more light upon the questions, than could have been obtained from a written examination. If there ever was a case in which there ought to have been an action at Common Law, to sift the truth, it is the present.

Result of the whole case.

Then, doing as my predecessors in this chair have done, taking all the circumstances together into my consideration, to what does the case come? A charge of adultery on one night, preceded by no one fact of improper freedom, or even of acquaintance, to render such adultery probable; proved by three witnesses, whose intentional veracity I have no ground for denying—testimony which, unless there were other circumstances, might be sufficient to establish adultery, and more than that, to call upon the Court to pronounce for the divorce—but opposed by the testimony of four other witnesses, to whom equally I cannot impute perjury. This is, as concerns the wife, not a civil, but in effect a criminal proceeding; if there be any doubt, she is entitled to the benefit of it. The evidence as to the fact on the part of the husband may, perhaps, preponderate; but I cannot say that the proof is free from reasonable doubt. I do not refuse the divorce on this ground alone; I look to the circumstances before marriage, and to the neglect of warnings afterwards—indirect warnings from her absence, direct warnings by letter; to the continued and unjustifiable cohabitation after the discovery of the alleged adultery; to the recklessness of his own honour, shewn by Dr. Dillon in this cohabitation, and in his subsequent interviews during the suit; to the suppression of evidence in Dr. Dillon's possession; to the absence of information which the Court is bound to require; to the non-discovery of the adulterer, or

satisfactory explanation, and consequently the want of proceedings at Common Law, so peculiarly essential in this case. For all these reasons, I am of opinion that, if I were to pronounce for the divorce, I should do towards the party proceeded against an act not warranted by the legal considerations applicable to the case, and set an evil example before the public, of granting relief in a case of grave doubt to one whose conduct towards his wife, and in this suit, tends so strongly to shew that he has no just claim. I dismiss the party.

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Dillon v. Dillon.
Libel not proved.
Party dismissed.

Proctors :—*Rothery*, for the husband ; *F. Dyke*, for the wife.

In Trinity Term, a suit was commenced by Mrs. Dillon against her husband for restitution of conjugal rights. Dr. Dillon appeared to the Citation personally, and, stating that he had not funds to defend the suit, professed himself ready to obey any direction of the Court.

The wife sues for restitution of conjugal rights.
May 31.

DR. LUSHINGTON.—Then I have no option but, in conformity to the law, and as a matter of course, to direct you to take your wife home and treat her with conjugal affection, certifying that you have done so the Court-day after next.

On that day, Dr. Dillon appeared and prayed to be dismissed. The Proctor for the wife alleged that the husband had not complied *bonâ fide* with the assignation of the Court, as regarded the residence provided for his wife, and prayed to be heard on his petition against his dismissal. On a succeeding Court-day, Dr. Dillon produced affidavits in answer to his wife's objection to the lodging he had provided for her. Her Proctor persisted in his prayer, and was assigned to bring in his petition next Court-day. Ultimately, however, the objection was withdrawn, and Dr. Dillon was dismissed.

June 16.
July 5.
Aug. 3.

High Court of Admiralty.

APRIL 25.

Collision.— **THE "DRUID."**—*Act on Petition.*—This was a suit by the owner (who was the master) of a Danish sloop, called the *Sophie*, against the owners of the *Druid*, a steam-tug, of Liverpool, belonging to a company at that place, for damage caused by collision. The *Sophie*, on the 12th October, was proceeding out of the port of Liverpool, on her return voyage home, when the steam-tug ran several times violently into her on the larboard side. Newton, the captain of the steam-tug, demanded, at the same time, the payment of £5, on account of towage said to be due for towing the *Sophie* into Liverpool some weeks preceding, when entering that port. Gustavus, the master of the *Sophie*, refused to pay the sum demanded, denying that any towage was done; whereupon Newton declared he would detain her; and though warned that he would be held responsible for the consequences, he caused a chain to be fastened round the foremast of the *Sophie*, and forcibly, and in the most wanton and outrageous manner, dragged her about, and finally towed her to a place called the Magazine, where he quitted her. In consequence of this treatment and detention, the *Sophie* received considerable damage—was prevented from proceeding on her voyage, and very great loss and injury subsequently accrued. To obtain redress, the process of this Court was resorted to, and the steam-tug arrested. An appearance was given for the owners of the steam-tug. The facts complained of by the master of the *Sophie* were admitted, the defence being that the proceeding of Newton was wilful and malicious, and that the owners were not responsible for the wilful and malicious acts of their servant, which acts were not authorized by them before they were committed, or adopted or sanctioned by them afterwards.

The owners of the *Druid*, on bringing in their Reply to the Act, prayed that the foreign owner might be required to give security for costs: and this question was debated.

Sir John Dodson, Q. A., supported the prayer; *Adams*,

1841.
Dec. 11.

1842.
Jan. 31.

D., objected that the application was unprecedented, and that the *Sophie* was arrested in another suit, for necessities.

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The Druid.

JUDGMENT.

DR. LUSHINGTON.—This is certainly not a motion of an ordinary character, and I have, therefore, considered it my duty to examine the matter carefully. I am quite disposed to require that security should be given for costs in all cases where the owner is resident out of the jurisdiction of the Court. It is a very great hardship upon individuals residing in this country to be sued where there is no chance of obtaining indemnity if they should be successful in the result of the cause. It is the general rule in all the Courts of Equity—so much so, that it is embodied in one of the standing orders of 1830; and I find it is also the constant practice in Courts of Common Law. There are several exceptions undoubtedly to this rule, but they are not applicable to the case now under consideration. I thought it my duty to read the Act on Petition, not knowing what the contents of it might be; but I will state the reason why I cannot look at the answers to the Act on Petition, because it is an established rule, and I think a right one, both in Courts of Equity and of Common Law, that security for costs should be demanded in the very first instance, and before the answer be given in. There are many reasons why that course of proceeding appears to be consistent with justice; but the reason which weighs upon my mind is, that it has been the established practice of other Courts, in a matter of the same description, and I think it is a precedent that I ought to follow.

Where the party suing resides out of the jurisdiction, it is the general rule in all Courts to require security for costs.

Then, I think, I am bound to direct that security be given for costs, unless there be any thing in the objection, that the vessel is arrested by the process of this Court in another and a different suit. If I could satisfy my mind that, having a hold of the vessel in another and a different suit, I could apply the process of this Court for the purpose of obtaining payment of these costs from the owner of the vessel, arrested in another suit, then I should hold my hand, because the principle of requiring security for costs stands upon this ground, that, unless that security be taken, the party proceeded against has no chance of recovering them,

Arrest of the vessel in another suit,

APRIL 23. if entitled to them. But I do not see how, where the vessel is arrested in a cause of a totally different kind, it would be in the power of the Court to make any decree which would be effectual. I think, therefore, upon every consideration of principle and justice, I am bound to require security for costs to be given in this case. Security to the amount of £100 will be sufficient.

The Druid.

no reason for exception.

Addams submitted that it was sufficient to give security before the release of the vessel in the other suit.

Security required before the suit proceeds.

DR. LUSHINGTON.—I am bound to require security before this suit goes on. The party must not proceed till he gives security for costs.

April 19.
Argument.

Addams, D., for Capt. Gustavus, the owner of the *Sophie*, was stopped by the Court, which, as the facts were admitted, called upon the Counsel for the owners of the *Druid* to shew their non-liability.

The master misconducted himself;

but owners not liable for his wilful and malicious acts.

Authority.

Distinction between negligence or accident, and malice.

Sir John Dodson, Q. A., for the Liverpool Steam-Tug Company.—I do not deny the fact, that the master of the *Druid* misconducted himself; and I admit the responsibility of his owners for what may happen through the unskillfulness and negligence of a person selected by them to command the vessel; but I deny that the owners are responsible for his wrongful, wilful, and malicious acts. There is no case which supports the contrary doctrine in this Court, or analogous proceedings in Courts of Common Law, in respect to matters on land. In *McManus v. Crickett*,* in 1800, which settled the law, Lord Kenyon delivered the unanimous opinion of the Judges of the Court of King's Bench, that a master is not liable in trespass for the wilful act of his servant done without his direction or assent.

Haggard, D., on the same side.—A distinction always taken in questions respecting the responsibility of owners for the acts of their masters, or a master for the acts of his servant, is, whether the act proceeded from negligence or accident, or from a vindictive and malicious feeling, and for the gratification of personal ill-will. *Ogle v. Barnes*.† It

* 1 East, 106.

† 8 T. R. 168.

is true that, generally and properly, a master is responsible for the conduct of the persons he employs, and is bound by their acts; but they must be acts in the ordinary course of their duty; therefore it is that the owner is responsible for the engagements of his master in matters *ex contractu*.

Here the acts are not *ex contractu*, but *e delicto*. The master went beyond his duty; he was entrusted with the vessel by the owners, and employed by them; but not to do damage wilfully to another vessel.

[*PER CURIAM*.—Nor to *PER CURIAM*.

do it accidentally or negligently. Suppose a steam-vessel, in a dark night, should proceed at the rate of ten miles an hour, and run against another vessel?] That would come under the head of negligence.

[*PER CURIAM*.—It would *PER CURIAM*.

evinced a total disregard of others.] It might be negligence of a very heinous character. But here is a wilful and wanton injury of the property of another. A master might

gratify his own malice at the expense of his owner: there would be no limitation. The distinction is, that, to make the owner responsible, the master must have been employed in his ordinary duty, *ex contractu*. Blackstone,* treating

of master and servant, says: "As for those things which a servant may do on behalf of his master, they seem all to proceed from this principle, that the master is answerable for

the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se*." And at the conclusion: "The wrong done by the servant is looked upon in law as the wrong of the master himself, and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong." But Mr. Justice Coleridge observes, in a note in his edition of the *Commentaries*:

"It is quite consistent with this principle, where the act of the servant is wilful, and not done by his master's orders, and has not been subsequently adopted by the master, that the servant alone should be responsible."

Addams, D., contra.—It is quite a new principle of law to set up that the owners of a vessel are not responsible for the consequences of a collision because it was caused by the wilful and malicious act of their master. The true principle.

* 1 Comm., c. 14, § 3.

APRIL 25.

The Druid.

Otherwise a master might gratify his malice at his owner's expense.

Principle upon which a master is responsible for acts of his servant.

The true principle.

APRIL 25.

The Druid.

A master's authority may be implied;

as in this case.

Ill consequences of owners' impunity.

Exceptions from general rule.

Authorities.

Exception in this case sanctioned by general convenience.

Cur. adv. vult.

ple is this: that a master is answerable for whatever is done by his servant, though it be wilfully and maliciously, and even feloniously, done, provided he can be taken to be acting by the command or authority of his master, either express or implied. Now, in this case, the owners employed a person, their manager, to negotiate a compromise with the foreign owner, and the master, who did this damage, is still in their employment. At the time of the outrage, another steam-tug, the *Mona*, belonging to the same Company, came up, and it is plain that the conduct of the master must have been for and on account of the Company. The *Mona* was the vessel which Newton had commanded when the towage was alleged to have been incurred, and his proceeding must have been owing to the implied authority and sanction of the owners, to enforce payment of a debt due to them.

Bayford, D., on the same side.—This is an outrage admitted to have been committed on a foreign vessel, in a British port, and if it be not cognizable here, is likely to be followed by other similar acts. If it be a general rule that a master is not liable for any unauthorized act of his servant, the rule is not without exceptions, where, on principles of public policy, Courts of Law have held that a master is responsible for the acts of his servant, although there was no inference of law that his authority had been given. *Grammer v. Nixon*.^{*} *Tuberville v. Stampe*.[†] *Rex v. Walter*.[‡] *Woodgate v. Knatchbull*.[§] *Brown v. Compton*.^{||} There is another rule laid down by writers, that a master is not responsible for the excesses of his servant in executing his commands; but in an old case, a Court of Law held that, under certain circumstances, a master was responsible.

Gibson's Case.[¶] Public convenience requires that the exception from the general rule should include the owners of steam-vessels, the force of which is irresistible, and which are owned by persons capable of making good the loss they may occasion.

PER CURIAM.—I think I am bound to take time to look into the cases before I give my opinion.

^{*} 1 Stra. 653.

[§] 2 T. R. 148.

[†] 1 Lord Raym. 264.

^{||} 8 T. R. 431.

[‡] 3 Esp. 21.

[¶] Lane's Rep. 90.

DR. LUSHINGTON.—The facts being admitted, the affirmative of proving the legal validity of the defence necessarily lies on the owners. Before I consider whether the defence can be sustained in law, it is necessary to inquire whether two of the facts essential to that defence be proved. Those facts are, whether the owners, directly or indirectly, authorized beforehand the aggression and detention admitted; or subsequently, by their conduct, adopted and recognized it.

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The Druid.

JUDGMENT.

The company state their agreement with their captains to be, that, on performing any towage service, the captain of the steam-tug shall obtain from the master of the vessel towed a certificate that the service had been performed, and the amount agreed to be paid; and if such certificate is not produced, the captain of the tug is to be charged with the amount. They then state that, as to this vessel, being informed by Newton that he could not obtain the five guineas claimed for towage, they wrote to Gustavus, the master, calling upon him to pay, which he did not do. Now, upon this statement, it would be impossible to hold that the company, directly or indirectly, authorized a forcible detention. The orders given are reasonable orders; and there is nothing to shew that the company intended they should be executed in an illegal manner. But this question is placed beyond all doubt by the direct averment, on behalf of the company, that they never authorized the detention of any vessel by their captains, on the ground of non-payment of towage; and such averment is supported by sufficient evidence, which is not contradicted.

Whether the owners authorized or adopted the master's acts.

With respect, then, to a subsequent adoption of the act—how is this to be legally effected? I am inclined to think, by no other conduct than that which would shew that the original orders for the detention were given by the company, or that the orders they did give, though not expressly to that effect, might yet admit of such a construction. The adoption here said to have taken place is, the authorizing the manager of the company to see the solicitor of Gustavus, the master, to know what compensation would satisfy him. The solicitor proposed £20, and there was some dispute as

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to the amount. But this is not all ; indeed, if it went no further, I do not think I could hold what was then done to be an adoption of the act of the captain, or an admission of the responsibility of the company, so as to bind them in law. I am not prepared to say that, if, before a suit is commenced, a master cognizant of an injury done by his servant shall negotiate for the settlement of the case in dispute, upon the payment of a sum of money, such master can afterwards be held, in any Court of Justice, to be so bound by such negotiation, that he could not avail himself of any legal defence to the action. I know of no legal principle which would warrant me in coming to such a conclusion, and I believe there is none. But it is not necessary to pursue this branch of the inquiry farther, for it is also expressly alleged and sworn, and not contradicted—and therefore I am bound to believe the fact—that whatever negotiation did take place was carried on by the manager of the company, not on behalf of the company, but on behalf of Newton, the captain of the tug.

Neither previous authority nor subsequent sanction proved.

Dismissing, therefore, from consideration any notion of previous authority or subsequent sanction given by the company, because such averments are unsupported by proof, I now come to consider the legal bearing of those facts which are either proved or admitted.

First, at the time of the aggression, Newton was on board the steamer, in command, and engaged in his usual occupation of looking out for employment in towing vessels. Further, the demand of towage-money was a duty imposed upon him by the company ; in making that demand, he must be deemed to be in the service of the company, and liable for all negligence or error ; but the aggression and detention, as is contended, were neither authorized by the company, nor reasonably incidental to any directions given by them ; but the assault and detention was the wilful act of the captain, and the damage arose therefrom.

Case must be governed by British municipal law.

The unfortunate master and owner of the *Sophie* is a foreigner, suing in this Court for redress of wrong inflicted within British jurisdiction, and his title to that redress as against the ship and the owners must be ruled by the munici-

pal law prevailing in the Courts of this kingdom, and governing the Court in which he sues. I have purposely used the expression, "suing in this Court, against the ship and its owners," for this reason; that I may consider, first, a point incidentally hinted at in the course of the argument—namely, whether the liability of the ship and of the owners is to be measured by the same rules; or whether the ship could be made liable in cases where the owners could not. In some cases, the ship may certainly be liable where the owners would not be personally so. These are cases of *lien* on a vessel acquired before the existing owners made their purchase,—as demands for seamen's wages, or bottomry bonds, where the owners have purchased after the *lien* has been acquired. Against such liabilities the owners may protect themselves by caution, or by contract; consequently, they would not be liable here. It might possibly be (though I give no opinion whatever on the point) that innocent purchasers might be liable to have their ship attached and sold for the payment of damages occasioned by collision before they purchased, in a case where the former owners would have been responsible; but there are cases where the liability of the ship attached prior to the ownership vesting in the existing owners. As to all cases occurring during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where the personal liability had not been given up, as in bottomry, by taking a *lien* on the vessel. The liability of the ship and that of the owners, I think, in those cases, are convertible terms,—the ship is not liable if the owners are not, and *vice versé*; in fact, the proceeding by arrest of the ship pre-supposes the personal liability of the owners, and is, by reason of that security of the property, a safer mode of proceeding to the plaintiff than an action *in personam*.

Now, bearing in mind the state of facts upon which the Court is to proceed, it is fitting to inquire what principle must be applied to them. The principle which I apprehend must govern this case is one of every-day occurrence in this and all other Courts—namely, the rules and doctrines which

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The Druid.

Whether liability of ship and owners is to be measured by same rule.

Principle to be applied to the case.

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The Druid.

Qualification.

Reasons of it.

apply to cases of principal and agent, and of master and servant. The liability of a master for the ignorance, neglect, and want of honesty in the conduct of his servant, in the transaction of his master's business, within the proper scope of his employment, is a rule universally recognized, and is indeed essential to the protection of mankind in the ordinary transaction of their affairs; but I must at the same time observe, that it does appear to be exceedingly difficult to ascertain, and perhaps impossible altogether to define, what is the meaning of the expression, "within the scope of his employment." But it is contended that no such liability exists where the servant, though occupied in the transaction of the affairs of his master generally, occasions an injury to another party by his violent, wilful, and malicious conduct. I must presently resort to the authorities and cases which bear upon this question; but before I do so, it is to my mind more satisfactory to consider upon what reasoning such an exception can be founded, and how far it is consistent with the principles of justice and public convenience, and within what limits, if the exception exists at all, it ought to be restrained.

In some instances it will, I think, be found that the line of demarcation must be traced with great care and accuracy. It is consistent with reason and natural justice that a man should be responsible for the skill, diligence, and honesty of the agent whom he employs in the performance of his business; he selects him; he is benefited by his exertions, and holds out to the world that he is a fit person to be trusted; in effect, he may be said to contract with those with whom he deals for the existence of those qualities in his agent—no one would deal with him otherwise. Unless, indeed, the principal was so responsible, the business of the world could not safely go on; the principal would be deriving a benefit from the acts of his agent, without being answerable for his misconduct; those who treated with the agent would have no remedy, save against men of straw, and all just confidence and facility of dealing would be destroyed. This I apprehend to be the reason upon which the general responsibility of the principal for the acts of his agent rests; and

It is on this principle that the decision of the case in *Strange** appears to be founded. In that case, the goldsmith was held responsible both for the forgery and fraud which his apprentice had practised with respect to one of his customers; and for the same reason, I apprehend, as a banker would be held responsible for the misfeasance or dishonesty of his clerk. These are all acts done in the business, in the discharge of the duty intrusted to the servants.

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But the present case is one of violence and wilful aggression, and is said to be distinguished, so far as the principal or master is concerned, from fraud. Why? If the distinction exists, there may be strong technical reasons as to the form of action; but the solid distinction, in point of justice, is not at first, at least, so apparent.

It may be said, that fraud and forgery are occurrences for which the goldsmith or the banker must be responsible, because they took place in the common transactions of business; whereas force and violence cannot possibly be contemplated in the discharge of any duty. This reasoning may be true, but it is not altogether satisfactory. The safer ground appears to me to be, to consider these as cases of implied contract. Again: criminal responsibility alone cannot constitute the distinction; for it may occur that the master of a ship may be criminally responsible, and yet the owners be liable for the damage, as in the case of a steamer going through a crowded roadstead, in a dark night, occasioning a collision, and destroying ship and crew. In a case of extreme recklessness, the master might be amenable for the offence criminally—he would be indictable for manslaughter; yet I conceive the owners would be liable for the damage. If so, in a case of general malice, in law, the owners would be responsible; in a case of particular malice—the wilfully running down a particular ship—they would not. My object in tracing this is, that I think it is always much more satisfactory to decide a case upon principles which come home to the judgment and the feelings of the whole world, than to decide it merely upon the authority of decisions where no satisfactory reasons have been assigned

Implied contract.

* *Grammer v. Nixon.*

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for them. Perhaps, however, there may be another reason; it might be said that, to make principals responsible for the wilful and malicious aggression of their agent, would be not only to make them answerable for acts done out of the scope of their employment, but expose principals to such risks as might seriously impede the despatch of business, and impose upon them responsibilities too severe to be endured. I can well conceive that such a case may occur—as, for instance, where the master of a vessel commits piratical acts.

I have been the more anxious, as I have observed, to sift this case, because the authorities do not afford much reasoning on the subject. If I were to be compelled to say what Principle of appears to me to be the principle upon which the cases I am the cases. about to examine go, it is this—that fraud may be incidental to the employment of agent—force never. But I must examine the cases; for if they lay down a rule applicable to the present, by that rule I must be guided, and not by any abstract reasoning or doubtful conjectures.

Cases.

All the cases as to master and servant, principal and agent, are more or less applicable, for they must all proceed on a common principle, and some of the distinctions are exceedingly nice. It is useless to waste time in examining the earlier cases, for, whatever be their import, they have been considered and disposed of in cases more recently decided.

McManus v. Crickett.

The first case to which I must refer is *McManus v. Crickett*. The judgment was delivered by Lord Kenyon, and embodied the unanimous opinion of the Court, which at that time consisted of judges of the highest reputation, amongst whom were Mr. Justice Lawrence and Mr. Justice Le Blanc. Lord Kenyon stated, in the course of his judgment, that no action could lie in that case, where the servant of the defendant had driven his master's carriage wilfully against the

Bowcher v. Noidstrom.

plaintiff's chaise. In *Bowcher v. Noidstrom*,* it was held that the master was not responsible where one of a ship's crew did a wilful act of injury to another ship, without direction from or the privity of the master, although he was on board at the time; and although it had been held at

* 1 Taunt. 568.

common law that, generally, a master was responsible for the acts of his crew.

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The Druid.

If the cases had rested here, notwithstanding the high authority of Lord Kenyon, and the case of *Bowcher v. Noidstrom*, I should have had considerable difficulty in understanding what the doctrine of the common law was. But there is a much more recent case, that of *Lyons v. Martin*,* *Lyons v. Martin.* decided in 1838. In that case, a servant was authorized to distrain some cattle. A horse was not upon his master's land, but close by, and he drove it off the highway into his master's close, and distrained it. It was held that the master was not responsible for this wilful act of his servant, out of the ordinary scope of his employment, though he was at that moment employed to distrain on behalf of his master; and the plaintiff, under the direction of Mr. Justice Coleridge, was nonsuited. Subsequently, Lord C. J. Denman said that Mr. Justice Coleridge had ruled rightly; and Mr. Justice Pattison stated that the master was liable where a servant caused injury by doing an act negligently, but not where he wilfully did an illegal act. I understand that a *A later case.* case has recently been decided, in the Court of Exchequer (but it is not reported), to this effect: that a master was not responsible where a coachman, in driving his master's carriage, removed a cart, which occasioned the destruction of some goods, the carriage being at the time employed on his master's service.

There are many other cases, with very nice distinctions, not necessary to be particularly noticed—as that a master is responsible for the negligence of a servant going out of his way on his master's business, though not if solely on the servant's own business—and, waiving these minute considerations, it seems to me impossible to doubt that, at common law, an action in this case could not be maintained against the company which own the steam-tug; and that on the principle laid down by Mr. Justice Pattison, namely, that the act of the master was a wilful aggression. If such an action could not be supported at common law, it cannot be maintained here; for not only am I bound by the autho-

* 8 Add. and Ell. 512. S. C. 3 Nev. and P. 509.

APRIL 25. *The Druid.* rities cited, but it would indeed be a gross anomaly if, because the proceeding is *in rem*, and not directly *in personam*, there should be another and a different species of law and justice administered in this Court. I am, therefore, under the necessity of dismissing the owners.

Owners dismissed.

Consequence of such acts.

I cannot, however, leave this case without expressing my deep regret that, in British waters, within British jurisdiction, the unfortunate foreigner, who is master and owner of this vessel, should have been subjected to this outrage and loss, and perhaps almost total ruin; and this not only without any redress, but without any punishment being inflicted on the delinquent, who has recklessly and wantonly occasioned the damage. If the captain go without punishment, and the foreign owner without redress, the example must be of evil effect; it must discourage the trade of foreigners with this country, afford a mischievous precedent for the like ill-treatment of British vessels in foreign ports, and be, certainly, a transaction discreditable to British hospitality and British justice.

Proctors:—*Deacon* for the foreign owner; *Gostling* for the owners of the vessel proceeded against.*

Prerogative Court of Canterbury.

APRIL 26.

An attesting witness to a will being unable to write, the other attesting witness (since deceased) wrote her name for her. Held, that, as both the witnesses had not "subscribed," the attestation was defective.

IN THE GOODS OF MARY MEAD, WIDOW, DEC.—*Mais.*—The deceased died in 1842, leaving a will, dated 24th May, 1838, subscribed with a mark, and having the names of two witnesses affixed, in the following manner: "Witness, F. P. S. j. B." There being no attestation-clause, an affidavit was called for from the surviving witness, S. J. B., when it appeared that, she being unable to write, her name had been written by the other witness (since deceased), who had written the will from the dictation of the deceased. The

* See proceedings against the *Sophie*, arising out of the collision in this case, *ante*, p. 393.

question was, whether this was a sufficient attestation under sec. 9 of the Act. APRIL 26.

Bayford, D., in support of the motion for probate, suggested whether the former part of the section, allowing testators to "acknowledge" their signature, might not be extended to witnesses; but Mand, dec.
MOTION.

THE SURROGATE* held that the Statute directed that the "witnesses" should "subscribe" the will, and as one of them had not subscribed (which had been done for her by the other witness), the requisites of the Act had not been complied with. DECREE.

Motion rejected.

Motion re-
jected.

Rothery, Proctor.

Consistory Court of London.

MAY 4.

VELEY AND JOSLIN v. GOSLING.—Libel.—This was a Church-rate. suit for subtraction of church-rate, by the churchwardens of Braintree, Essex, against Mr. John Gosling, a parishioner, for the recovery of the sum of £23. 14s. The Libel, which now stood for admission, pleaded that a church-rate had been refused in this parish for several years past, and that, in fact, no rate had been raised for the repair of the church since 1834; that the church was in great need of repairs, and that, in conformity with a decree issued by this Court at the suit of the vicar, against the churchwardens in special and the parishioners in general, to meet and make a rate, a vestry meeting was duly convened on the 15th of July, at which the churchwardens proposed a rate of 2s. in the pound; that an amendment was moved and seconded, to the effect that the parishioners refused to make any rate whatever for the repairs of the church; that such amendment was carried by a show of hands, and no poll was demanded; that thereupon the churchwardens and the minority of the parishioners then assembled at the vestry made and signed a rate of 2s. in the pound. —At a vestry duly convened by the churchwardens, in obedience to an express motion of this Court, to make a rate for the necessary repairs of the church; a rate being refused by the majority, the churchwardens and the minority, then and there assembled, made a rate:—such rate held to be invalid.

* Dr. Daubeny.

† *Scale v. Veley and Joslin, ante, p. 170.*

MAY 4. In a prior proceeding by the same churchwardens against another parishioner (Mr. Burder), the former, on the authority of an anonymous case in 1 Ventris, 367, and the case of *Gaudern v. Selby*,* in the Court of Arches, had, on the refusal of a rate by the vestry in 1837, made a rate of their own authority; the proceedings in this Court against Mr. Burder, however, were stopped by a rule for a prohibition granted by the Court of Queen's Bench, and eventually the Judges in the Court of Exchequer Chamber, whither the case travelled by Writ of Error, decided that the rate was bad.†

Feb. 23.
ARGUMENT.

Objections to
the rate.

Decision in
Burder v. Veley.

Principle on
which the rate
is supported.

Addams, D., for the party cited.—The Libel is inadmissible *in toto*, for these reasons: first, a rate made on the principle of this rate is bad; secondly, if a rate made on this principle might be a good rate, still *this* is bad; thirdly, the Libel contains superfluities. The hint of this rate was obviously taken from what fell from Lord Chief Justice Tindal, in delivering the judgment of the Court of Exchequer Chamber on the Writ of Error, on the 8th February, 1841, namely, "that there is a wide and substantial difference between the churchwardens alone, or the churchwardens and the minority together, making a rate at the meeting of the parishioners where the refusal took place; and the churchwardens possessing the power of rating the parish by themselves at any future time, however distant." It is clear that the "churchwardens alone," and the "churchwardens and minority together," are one and the same thing; for if all the parishioners were to vote against the rate, the churchwardens, being the minority, might make one: so that it would appear that the question had made very little progress, if the principle of such a rate could be maintained. But the Chief Justice expressly said that the Court gave "no opinion" upon this point, but "reserved to themselves the liberty of forming one whenever the case shall occur:" so that this was said *obiter*. On what principle is it suggested that a church-rate made in such a manner as this may be a good and valid rate? Why, it is said that the obligation of parishioners to repair the parish church is a common law

* 1 Curt. 394.

† 12 Ad. and Ell. 372.

obligation. In what sense this expression was used, I will consider presently. If it were meant in the same sense as the common law obligation to repair bridges and highways, I dissent from the doctrine. This common law obligation is founded upon some supposed analogies. In order to establish an analogy, there must be similarity—*aliquid simile*, is the expression of Quintilian. If I can shew that there is no similarity whatever, there is an end of the analogy. I had always understood that it was a maxim of the British constitution that a subject could not be taxed but by his own consent, actual or virtual; but if the principle of this rate be admitted, a tax could be imposed by a junta in a parish, and a minority could compel a majority to pay the tax. The analogy suggested by the Judges in the Exchequer Chamber is that of the members of a corporation aggregate assembled for the purpose of choosing an officer, where the majority refuse to vote, and the minority elect. Is there any similarity between the cases—one of the imposition of a tax, the other the exercise of a franchise? The analogy is attempted to be made out by stating that it is the duty of a vestry to make a rate—and I admit that it is obligatory upon a parish to repair the parish church—and it is said that if the parishioners went to the vestry and would not vote for a rate, their votes would be thrown away, as in the analogous case of the election of a corporation officer. But the election of an officer is not in the same sense a duty obligatory upon the electors—it is a privilege, or it is an imperfect obligation that could not be enforced by any penalty. *Rez v. Monday*; * *Rez v. Spencer*.† But is the duty of repairing the parish church an imperfect obligation? It is a perfect obligation; it is a duty which it is highly penal not to fulfil, and in former times parishes were laid under an interdict and excommunicated for its non-fulfilment. The supposed analogy, therefore, comes to nothing. If the rate was founded upon the common law obligation, then the monition which has been obtained was useless; but in order to establish an analogy, a monition has been obtained, upon a precedent in the Court of Arches, in the Headcorne case, which was itself

MAY 4.

Veley v. Gostling.

Not applicable.

Effect of the monition.

* Cowp. 530.

† 3 Burr. 1697.

MAY 4. founded upon a precedent in Archdeacon Hale's work :^{*} a particular time and place were fixed for making the rate; and it was supposed that, if the majority of the vestry at that meeting refused the rate, by analogy, the minority might make one. Now, as to the sense in which this obligation is a common law obligation. I admit that the parish is bound, if the church be in need of repair, to repair it; that the repair of the fabric of the church is a duty which the parishioners are compelled to perform, not a mere voluntary act which they may perform or decline at their discretion; that the law is imperative upon them, absolutely, that they do repair the church; that the only question upon which the parishioners when convened can determine is, how and in what manner the common law obligation so binding them may be most effectually and conveniently performed. But the question is, in what sense is the term, "common law obligation," used? Is it meant in the same sense as with reference to bridges and highways? If so, I

The law on which the obligation of the parish rests.

do not concur in the opinion. The obligation is imposed upon the parish by the common law of the church, and therefore by the common law of the land, because the law of the church is a part of the common law of the land, by adoption of the canon law. Bishop Gibson has shewn† the distinction between the *jus commune ecclesiasticum* and the *jus commune laicum*. The obligation upon a parish to repair the parish church is by the *jus commune ecclesiasticum*, otherwise the Courts of law would not refuse, as they do, to enforce making church-rates by *mandamus*, and have even declared that church-rate is not part of the *jus commune laicum*. *Rex v. St. Peter's, Thetford*.‡ *Rex v. St. Margaret's and St. John's, Westminster*.§ The present rate, however, is a mongrel sort of rate, half ecclesiastical and half civil, and I object to proceedings in this Court to recover such a rate. If it be a common law rate, founded upon a common law obligation, the proper remedy is by distress, when the party might replevy, and the question might be tried by

If the common law, remedy by distress.

* *Precedents in Causes of Office against Churchwardens*, 1841.

† *Codex*, Introd. xxvii.

‡ 5 T. R. 364.

§ 4 M. and S. 230

action.* *Non constat*, if that course had been taken, that the party cited, who is a Dissenter, might not have allowed his goods to be distrained, and there the matter might have ended. The present course of proceeding gives a large authority to churchwardens, whose legal powers are extensive. There are other minor objections. The majority was not properly ascertained, since a mere show of hands could not decide the point, persons of a certain amount of property having a plurality of votes. A further objection is, that the rate is for the repair of the chancel, whereas the parishioners are bound to repair the nave only. Another objection to the rate is, that it is excessive, inasmuch as persons have been excused, by the sole authority of the churchwardens and minority, whose rentals amount to £1,000 a year. This is a fatal objection. *Thompson v. Cooper*.†

MAY 4.
Voley v. Gosting.

Sir John Dodson, Q. A., for the churchwardens.—It has not been denied that the church was out of repair; that the churchwardens were without funds, and a rate was absolutely necessary; or that they acted in obedience to a decree of this Court, by convening a vestry, which refused the rate. I admit that this mode of making the rate was adopted in a great measure from the observations which had fallen from Lord Chief Justice Tindal, which confirmed the view the churchwardens and their advisers had taken of the subject. The principle upon which the rate rests is this: that, by the common law, the parishioners are bound to repair the parish church—a duty incumbent upon them—a burden of which they cannot get rid. This has been laid down in the strongest language by the Judges in the Exchequer Chamber. Dr. Addams seems to think that there is a distinction between the common law of the land and the common law of the church; but I apprehend that there is no real distinction between the two, but only in respect to the

True principle of the rate.

* This has been since done, in the parish of Bradford, and the action of replevin was tried at the York Summer Assizes (*Dale v. Pollard and others*, August 26th), when a verdict was taken by agreement for the plaintiff in replevin (the parishioner), subject to a special case for the opinion of the Court.

† 3 Phill. 640.

MAY 4. Courts which enforce the law, and that the subjects are bound by one law as much as by the other. The vestry, when duly convened, in obedience to the monition of this Court, did not object to the form or manner of making the rate, but absolutely refused to make any rate at all, at any time. The Judges in the Court of Exchequer Chamber, though they considered the case in *Ventris* (which contained a *dictum* at common law, that the churchwardens might make a rate) as "short and unsatisfactory," treated the case of *Gaudern v. Selby* in a different manner; and although there was a distinction between that case and the case of *Veley v. Burder*, there is no real distinction between it and the present case. The only difference between the cases is, that in *Gaudern v. Selby* the rate was made by churchwardens alone at the same vestry-meeting where a rate had been refused, and in the present case it was made by the churchwardens and some of the parishioners at the same vestry. I am, therefore, entitled to claim the judgment of this Court, at least, in favour of the Libel, as being governed by the case of *Gaudern v. Selby*, in the Arches Court, which has not been reversed. The whole effect of the decision in the Exchequer Chamber was this: that the churchwardens, in that case, having made a rate of their own authority, not in vestry, were not justified by law; but the Judges threw out an intimation as to the effect of a rate made by the churchwardens, at the same vestry, with the minority.

PER CURIAM.—Lord Chief Justice Denman, in the Court of Queen's Bench, entirely repudiated the authority of that case; the utmost the Judges in the Exchequer Chamber said was, that they gave no opinion upon it.] I submit that there has been no express decision against *Gaudern v. Selby*. The parishioners are to a certain extent to be considered as members of a corporation, and the principle referred to by Lord Chief Justice Tindal is to be found in the case of *Oldham v. Wainwright*,* and is applicable to the present case. Dr. Addams says, there is no analogy between the cases put by Lord Chief Justice Tindal, as there is no similarity in the things; that the imposition of a tax is one

* 2 Burr. 1017.

thing, and the exercise of a privilege another. But where it is imperative on persons to do a certain act, as to make a rate for the repairs of the church, and where some of those persons refuse to perform that duty, voting against any rate at all, there is an analogy between such a case and that put by the Chief Justice; and those who did vote, though a minority as to numbers, would bind the rest. In this case, it was not a putting off the rate for a week or a fortnight, till a more convenient time, but it was a vote against any rate at all, on the ground of conscience. When a parish is so placed, does not the case arise which was contemplated by Lord Chief Justice Tindal, in which the churchwardens and the minority should proceed to fulfil the obligation laid upon them and the parish? Then it has been said, that the majority has not been properly ascertained. But no poll was demanded, and the churchwardens were not bound to call for one; the Court will take the allegation in the Libel to be true, that there was a majority, and assume that the churchwardens could prove the fact. But suppose there was not a majority for the amendment, then the rate would have been adopted, for there was no other amendment. With regard to the objection that parties, to the amount of £1,000, have been excused from paying the rate, these persons are poor and unable to pay, and in the case of *Chesterton v. Farlar** it was decided that the omission of such persons was no ground of objection to a church-rate. They have not been excused by the churchwardens, but by the parish. The rate, therefore, which has been made in this case, in virtue of a common law obligation, is binding upon the parish, and the Libel ought to be admitted.

Haggard, D., on the same side.

PER CURIAM.—After what has been said in the Court of Queen's Bench and the Exchequer Chamber respecting the case of *Gaudern v. Selby*, I feel myself quite at liberty to exercise my own judgment upon this question, without considering, as I did in *Veley v. Burder*, that case as a binding decision upon me, and I am satisfied that, if I were to abstain from exercising my own judgment, and a prohibi-

MAY 4.

Veley v. Gosling.

Where it is imperative on a corporation to do an act, the majority refusing, the vote of the minority binds.

Cur. adv. vult.

* 1 Curt. 345.

MAY 4. tion should be moved for in the Court of Queen's Bench, that Court would think I had not discharged the responsibility which the law has cast upon me. I shall take time to consider the questions in this case.

Velez v. Gosling.

MAY 4.
JUDGMENT.

DR. LUSHINGTON.—Before I consider the principal question at issue in this case, I think it expedient to dispose of the minor objections raised to the validity of the rate, and consequently to the admissibility of the Libel.

The minor
objections to
the rate.

One of these objections arises thus: the rate being proposed in vestry, an amendment was moved, which concluded by refusing that rate; no poll was demanded or taken; but, on a show of hands, the amendment was declared to have been carried; thereupon, the churchwardens, with the minority, proceeded to make the rate in dispute; and it is contended that it was necessary in the first instance that a poll should have been taken, on the ground that, in many cases, individuals being entitled, according to the Statute, to a plurality of votes, the real number of votes could only be ascertained by poll: and it is undoubtedly true that, in this mode of voting by show of hands, a majority of individuals may not constitute a majority of votes. I think, however, that this objection cannot be sustained, for this reason—that, no poll being demanded, the whole vestry must be considered as acquiescing in the decision of the chairman; otherwise, in every case of a difference of opinion in the vestry, there must be a poll, though not demanded, which would be a great impediment to business and occasion much inconvenience. It must also be remembered (though the argument is not altogether conclusive) that, if it could be supposed that the majority were not in favour of the amendment, the fair presumption in this case (though not always) would be, that they were in favour of the rate. This argument would not be always conclusive, for this reason; it might be that some voted against the amendment, disapproving of the manner in which it was put, and who might be disposed to negative the rate itself. On this head, therefore, the present defendant can have no substantial reason to complain, though possibly the fact may have some other bearing on a subsequent view of the case.

It is also said, in objection to the rate, that the estimates include repairs of the chancel, and in all ordinary cases the parishioners are not bound to repair the chancel, and a rate for or including such repairs could not be sustained. But I am not satisfied that the estimate does include the chancel : it does certainly specify the oak door to the chancel ; but this may, for aught I know to the contrary at present, be a burthen properly falling on the parishioners ; it may be a door common to nave and chancel ; therefore, I should not in this stage consider the including this door fatal to the rate, as it is a circumstance which may be explained.

MAY 4.
Vokey v. Gooking.

The last of these objections arises on the pleading in the 5th article of the Libel, where it is alleged that a large number of the inhabitants rated are in such a state of poverty that the rate could not be recovered from them, and that to an extent of not less than £1,000 per annum. I presume that this fact was so pleaded, in order to meet any objection that the rate is excessive ; but whatever be the motive, I do not apprehend that this statement can vitiate the rate, or render it my duty on that account to reject the Libel. The rate does, as it ought to do, contain the names of all persons by law liable to pay, and both authority and necessity shew that, in fact, some must be excused on account of poverty. Prideaux says : " All such who are so poor as to be excused from paying to the poor's-rates, by reason of their poverty, ought also to be excused from paying to the church-rate for the same reason.*" Here the amount, in respect to value, which it is pleaded cannot be recovered, is doubtless very large ; but I cannot say that it may not be shewn that those occupiers must be excused on account of poverty, or that it is untenable to say that it is not lawful so to excuse them.

Having disposed of these objections, I now approach the new and important questions raised on the admission of this Libel ; and, first, it is necessary to give a brief summary of the facts. A decree issued from this Court, founded on an affidavit setting forth that the church was out of repair, and that rates had been for several years refused ; the Libel also sets forth the prohibition which had emanated in the for-

* *Dir. to Churchwardens*, p. 83, 10th Ed. (by Tyrwhitt).

MAY 4.
Veley v. Gosling.

mer case* from the Court of Queen's Bench, and the circumstances under which it issued. That decree called upon the churchwardens and parishioners to shew cause why a monition should not be granted to the churchwardens to take the proper steps to put the church into repair, and to call a vestry for a certain day for the purpose of making a rate, and directing the parishioners to attend and make such a rate. The churchwardens appeared to that decree, and declared their readiness to submit themselves to the lawful commands of the Court: no appearance was given on the part of the parishioners. A monition then issued to the churchwardens and parishioners to the effect of the decree; the vestry met on the 15th July last; a rate was proposed; an amendment refusing the rate was moved; and, on a show of hands, the vicar (who was in the chair) declared the amendment carried; no poll was demanded; all acquiesced in his determination. The churchwardens, with several others, then signed the present rate, which was not put again to the meeting. The defendant was sued for this rate, and the question is, whether a rate so made is legal and valid. I wish it to be particularly borne in mind that all the observations I may make I intend to apply only to the validity or invalidity of this particular rate, as the sole question which I have to determine.

I am anxious, as far as it lies in my power, to state my opinion, and the grounds of it, clearly and intelligibly, and
 The questions. I propose, therefore, first, to consider the case of *Gaudern v. Selby*, its bearing on the present case, and the weight it is entitled to; secondly, the effect of the judgment of the Court of Queen's Bench, in the former *Braintree* case, in reference to the present; thirdly, the judgment of the Court of Exchequer Chamber in the same case; fourthly, I shall endeavour to examine the ecclesiastical and common law authorities, with respect to the validity of the present rate; and, fifthly, I shall apply myself to the doctrine as to the election of corporate officers and members of Parliament, which doctrine, it has been contended, ought to govern the present case, and to uphold the validity of the rate.

Case of *Gaudern v. Selby*. I.—With regard to the case of *Gaudern v. Selby*, I did, as

* *Veley and Joslin v. Burder.*

the former occasion, having found it a precedent in the proper sense of the term, yield my own judgment, as bound to do, to the superior authority of the Court of Arches, and it has been argued at bar that I ought to pay the same deference to it now as I formerly did, as the decision of a superior Court. But I was at the argument, and I still am, most clearly of a contrary opinion; because not only has the doctrine laid down in that case, as it appears to me, been repudiated by the Court of Queen's Bench and the Court of Exchequer Chamber, but the Court of Queen's Bench has impugned that case by reason that no authority was cited to support it, and this in very strong terms. Discarding, therefore, the notion that the case of *Gaudern v. Selby* is any longer a precedent to govern and bind down my own judgment, I will next consider whether, though no longer binding as a precedent for the position attempted to be established in the former case, it ought to be considered as an authority, not to govern me, but to which I ought to pay consideration, in the present case.

MAY 4.
Velez v. Gosling,

Not a binding precedent.

I have again carefully examined the proceedings in that case, and I am not disposed to retract any one observation I formerly made upon it. I will not occupy time by referring to all the particulars, but some must be shortly touched on, in order that the grounds of my opinion may be made known, and that such opinion may not rest solely upon general declaration. I disclaim having at any time laid any stress on the discrepancy of dates in that case, for I observed then that the dates were not correct, though that circumstance might be explained; but there are some facts and circumstances connected with that case, which, after all the consideration I could bestow upon them, and after reading all that has been written in explanation of that case, still appear to me utterly inconsistent with all regularity of proceeding in our Courts beyond all that has ever happened. One of the first things that struck my attention in that case was this: the same individual was Surrogate in the Archdeacon's Court, and of the Vicar-General, and of the Consistory Court. Now this would account for the Court sitting in one place, and for the individual proceeded

The history of that case.

Irregularity of the proceedings.

MAY 4.
Veley v. Gosling.

against being summoned to appear in the same place; but it never will account for the utter confusion in the proceedings between the two Courts, so that no man could venture to say, after examining the original proceedings, in which Court the suit was commenced and carried on. I will not go through the whole of the proceedings, but I will point out one or two circumstances, which will be sufficient for my purpose. There is a return to the Monition to transmit process, and it purports to be by the Reverend Spencer Madan, Vicar-General, Commissary-General, and Official Principal of the Bishop of Peterborough, and by the Reverend Mr. Brown, Archdeacon of Northampton. Now the Monition was directed to George Watkin, described as Surrogate of the Reverend Spencer Madan, Vicar-General, &c. and also Surrogate of Mr. Brown, the Archdeacon. The return purports to be made by Mr. Madan only, as Vicar-General, though he has searched the Registries of the Consistory and the Archdeaconry. The Citation is in the name of the Archdeacon alone, requiring the party to appear before himself, or his Surrogate, or other competent judge, in the Consistory Court, on the 28th day of May instant, and it is dated 17th day of April, 1794. The Libel is in the name both of the Vicar-General and the Archdeacon. The Monition to answer the Libel is in the name of the Archdeacon only, and it cites Gaudern to appear in the Consistory Court, 27th January, 1795, and the personal answer is entitled, in the Consistory Court of the Bishop of Peterborough, and the Archdeacon of Northampton's Court &c. I will not go through many other circumstances in the case which appear to me equally remarkable, as shewing the confusion attending it from the beginning to the end; but one circumstance, infinitely more important, is, that the sentence, dated 22nd November, 1796, states expressly that the rate was made by the majority of the vestry, whereas the rate was proved by the evidence not to have been made by the majority of the vestry. These were some of the circumstances which struck my mind in the consideration of that case; but when I look at its progress through the Court of Arches, it does clearly appear to me that the case did not

The sentence states that the rate was made by the majority; the fact not so.

attract that attention which, under ordinary circumstances, such a case must necessarily have commanded. The Allegation pleads that the rate was made by consent of the majority of the vestry, and this Allegation is signed by Lord Stowell himself, then Sir William Scott, and it was never opposed in the Arches Court. In all the argument, there was not a single authority cited on one side or the other. But with regard to the present case, whether I ought to receive the case of *Gaudern v. Selby* as overruling my judgment, or rather, whether I ought to depart from the exercise of my own judgment, and bow to it as a precedent, it is clear from the notes both of Dr. Arnold and Sir C. Robinson, that Sir William Wynne had not the slightest notion that he was considering the question which I have now to decide, and consequently he could not have decided it. He thought he was deciding the question whether, when the vestry had refused a rate, it was competent for the churchwardens to make that rate; but Sir William Wynne never dreamed of the present question, whether a rate, made by the churchwardens and the minority of a vestry, would be a valid rate. Looking, therefore, to these circumstances; considering that the case of *Gaudern v. Selby* has been expressly disclaimed as an authority by the Court of Queen's Bench; that, having lost its original authority, it was not set up by the Court of Exchequer Chamber (for that Court, having abstained from giving any opinion upon the present question, never did or intended to pronounce any opinion, as relating to this question, on *Gaudern v. Selby*); for all these reasons, I think that that case of *Gaudern v. Selby* is not only not a precedent binding upon this Court, but is not even an authority upon the present question. I think it is more than probable that the great pressure of business in 1799, when Lord Stowell had become Judge of the Admiralty Court, with the great arrears and the little interest which cases of church-rates then excited, occasioned it to be discussed and disposed of with less research and less attention than under other circumstances would probably have been the case.

MAY 4.

Veley v. Gosling.

No authority cited in argument.

The judge did not consider he was deciding present question.

That case is no authority.

II.—Proceeding in the course I have prescribed to myself, I will now examine the judgment of the Court of Queen's

Judgment in *Burder v. Veley.*

MAY 4.
Veley v. Gosling.

Bench in the former Braintree case. Now what was decided by the Court of Queen's Bench; and how far is its decision applicable to the altered circumstances of the case now before this Court? I must look to the facts. It decided that the churchwardens could not, after a rate had been refused by a majority of the vestry, make a valid rate by their own sole authority at a subsequent time. Accurately speaking, that was the sole question before the Court, and, in legal strictness, the only question decided. But it is clear that the Court of Queen's Bench did not contemplate, in its judgment at least, the distinction taken by the Court of Exchequer Chamber, and consequently laid no stress upon the fact, that the rate was made by the churchwardens alone out of vestry, and not by the churchwardens and a minority of the parishioners in vestry. The decision of the Court of Queen's Bench is plain; it goes upon the principle that a rate made against the consent of a majority of the vestry is illegal. Then, how am I to deal with that decision? Not as a precedent, fettering and controlling the free exercise of my own opinion in the present case,—for the Court of Exchequer Chamber has told me, that in that light the decision of the Court of Queen's Bench ought not to be considered; but I apprehend it is my duty to look at the principles on which that judgment is founded, and the whole train of reasoning adopted by the Court of Queen's Bench, and see how far the principles and reasoning are applicable to the present case.

Principles on which it was founded.

The first principle is, that the law requires a clear demonstration that a tax is lawfully imposed: this doctrine is in strict unison with the principle laid down by Lord Tenterden and the Court of King's Bench, in *Cockburn v. Harvey*,* the Select Vestry Case. The next principle is—though it appears almost superfluous to notice it—that the power to impose a tax must be derived from an Act of Parliament, the common law, or immemorial custom. A third is, that the fact of no usage prevailing in support of such a power of taxation is evidence against it. A fourth is, that a usage of imposing the same tax in a different way is evidence against

* 2 B. & Ald. 800.

the power claimed. Fifth, that absence of any mention of such power in the books of Reports is evidence against it. Sixth, that the *onus* of proving the legality of the power claimed must devolve on those who maintain its legality. These appear to me to be the chief general principles which the Court of Queen's Bench applied to the case before it. I must reserve for the present the question of their applicability to the case under consideration, and proceed to examine the same case in the Exchequer Chamber.

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Veley v. Gosling.

III.—Now, what did that Court do when the case came under its consideration, as a Court of Error? It agreed with the Court of Queen's Bench, that there was no custom to warrant a rate made, not by the vestry, and against the consent of the vestry, by the churchwardens alone, and no authority for its validity; but the Court held that "there is a wide and substantial difference between the churchwardens alone, or the churchwardens and the minority together, making a rate at the meeting of the parishioners where the refusal takes place, and the churchwardens possessing the power of rating the parish by themselves at any future time, however distant." It is to this "wide and substantial difference" between that case and the present to which I must direct my best attention.

Decision of
the Exchequer
Chamber.

But, first, it is necessary to notice, what the Court of Error declared it would not do, and what it reserved. The Court, advertng to *Gaudern v. Selby*, said:—"We do not enter into the discussion whether a rate, so made by the churchwardens at the parish meeting where the parishioners are met, would be valid or not, or how far such a case may be analogous to that of the members of a corporation aggregate, who being assembled together for the purpose of choosing an officer of the corporation, the majority protest against and refuse altogether to proceed to any election; in which case they have been held to throw away their votes, and the minority, who have performed their duty by voting, have been held to represent the whole number." Again, referring to a rate made in vestry, by the churchwardens and the minority, the Court said:—"Whilst we give no opinion upon the point, we desire to be understood as reserving to our-

MAY 4. selves the liberty of forming an opinion whenever the case shall occur.”
Veley v. Gosling.

Neither decision fetters this Court.

I conceive that I have now sufficiently disposed of the cases of “*Gaudern v. Selby*,” and “*Veley v. Burder*,” both in the Court of Queen’s Bench and the Exchequer Chamber, and that I am justified in approaching the present question, unfettered by *Gaudern v. Selby*, as a question undecided by either ; but it was deemed by the Court of Error deserving of great consideration, as I conceive, with reference to the general law, and with regard to its possible analogy to a case of frequent occurrence in corporation law. I cannot believe that the Court of Exchequer Chamber would have gone out of its way to make special remarks upon particular cases, unless it was a point of grave consideration. But, on the other hand, it said, in express terms, that it gave “no opinion” upon the point.

Is the rate valid by ecclesiastical or common law?

IV.—Then, is the present rate valid by the ecclesiastical or common law, without resorting to the analogy of corporation law? There is, in the opinion of the Court of Exchequer Chamber, a wide and substantial difference between a rate made by the churchwardens and a minority in vestry, and a rate made by the churchwardens alone out of vestry. Remembering this, it is important to ascertain in what that difference consists, for upon its existence must depend the applicability of a decision, opposite to that which courts of common law apply to the former case.

Distinctions between this case and the former :

— 1. A rate made in vestry by the minority and out of vestry by churchwardens alone.

Now, there is one important and substantial difference between the two cases, *viz.*, the time when the rate is made, whether in the vestry, immediately after the refusal by a majority, or at a subsequent period by the churchwardens alone ; for it is obvious that, if the rate were valid when made in vestry by the churchwardens alone, it would be impossible to fix any period short of their whole incumbency within which it must be made. There would be nothing to conclude the time—a month after the vestry refused, six months, or even ten months, and the effect of this might be, that the churchwardens, by postponing the making of the rate, might, if they had the power of doing it by themselves, not in the vestry, make one upon a consideration of subse-

quent circumstances, which most, though not all, would agree ought to have been submitted in the first instance to the vestry. It is true, indeed, that this difference would be of less importance if the doctrine, of the vestry being purely ministerial, should be adopted to its full extent ; for if the churchwardens are the sole judges in the first instance of what are essential repairs, and the mode of making them, and the vestry are bound to raise the money without expressing any opinion, it would matter little whether the rate were made by the vestry, or by the churchwardens and a minority of the vestry, or by the churchwardens afterwards. But upon the supposition that the vestry have some discretion to exercise, I agree with the Court of Error, that the distinction is not an unimportant one.

MAY 4.
Velazq. v. Gosling.

The next point of difference is, that where a rate is made by the churchwardens in vestry, there may be a minority ; if made out of vestry, it must be the act of the churchwardens alone. I cannot, after mature reflection, perceive that this distinction is of any essential importance, for I cannot understand how the minority can confer any legality upon the act which would not equally attach upon it if done by the churchwardens alone. The minority may vary from approaching close to a majority of the vestry down to a single individual. I have no safe rule on which to stand. I cannot, therefore, rely upon this difference ; and, save what I have already noticed, other difference between the case decided and the present one, I can find none.

—2. Where made by churchwardens in vestry, may be a minority.

I will now endeavour to consider, whether any authorities in common law or ecclesiastical law so apply to the present case thus distinguished, as to render this rate valid, though the former was illegal ? There is one peculiarity attending the making of this rate, which possibly may be deemed of great importance, namely, that it was made by a vestry summoned in the ordinary manner, but in consequence of a Monition issued by this Court, calling upon the churchwardens to take the necessary steps to put the church in repair, and directing them to call a vestry for a particular day, for the purpose of making a rate ; a mode of proceeding authorized by a precedent recently set in the Court of Arches. I had

Authorities applicable to present case.

Peculiarity of this rate, being made in consequence of a monition from this Court.

MAY 4. some doubts, which I expressed at the time,* and they are now not altogether dispelled, as to the propriety of fixing the day and hour in the Monition ; but, be that as it may, the rate, howsoever otherwise made, is made in pursuance of the directions of this Court, and such directions, until the contrary be decided, I must consider as legally given by a competent authority : indeed, there is an abundance of precedents to support this course of proceeding. But with regard to a rate so made, although there are precedents for issuing a Monition, yet with a regard to a rate made by the churchwardens and the minority of the vestry, I confess I can find in the ecclesiastical law no such authority whatever. With the single exception of *Gaudern v. Selby*, I can find no case applicable to a rate made as the present rate was made, and that case of *Gaudern v. Selby*, if it be an authority, is an authority for making a rate by the churchwardens alone, and not in conjunction with a vestry.

Ecclesiastical authorities. — Precedents collected by Arch-deacon Hale include none applicable to present case. Since the former Braintree case was agitated, Mr. Arch-deacon Hale has rendered a very valuable service, by bringing to light a collection of precedents, with reference to proceedings in the Ecclesiastical Courts, to enforce the repairs of churches. I have examined them all carefully, but in not one of them can I find the trace of an authority affirming the validity of a rate made by the churchwardens and a minority of the vestry. One, indeed (though it is scarcely proper to cite a single precedent from a country court) would shew (A. D. 1600) that the supposed course was to direct the churchwardens alone to make a rate, and that to reimburse the churchwardens of a former year.† It may be well briefly to notice some of these precedents, observing at the same time, that there is a manifest distinction between the actual making of a rate, and voting by the vestry that a rate should be made ; that if this distinction be not kept in mind, these precedents may go a length which could not now be maintained ; namely, that a rate might be now made by order of the Ecclesiastical Court, without in the first instance calling a vestry at all : this, whether done by commission from the Ecclesiastical Court, or by order to the

* See ante, p. 171.

† Ut sup. p. 198.

churchwardens, is clearly illegal. It may be, that some of the precedents collected by Mr. Archdeacon Hale are of this description, namely, precedents before it was decided that a rate made by commission from the Ecclesiastical Court was illegal. The decision in *Rogers v. Davenport** was not till 1675, when it was decided, that such rating by commission was illegal. A precedent applicable to the present case would be a case where a rate was made by the churchwardens and a minority of the vestry, and afterwards enforced by the Ecclesiastical Court: a case where proceedings were had against individual parishioners, not to recover the rate, but to punish them, would not tend to uphold the rate, but the contrary.

MAY 4.
Veleys. Gooling.

I shall now endeavour to classify some of these pre- Their nature.
cedents. 1. There are Monitions to churchwardens to repair—a proceeding strictly legal. 2. Monitions to churchwardens to call parishioners together to make rates, as in the present case. 3. Commissions for making rates, which are illegal. 4. Monitions to churchwardens to make rates, but not, so far as I can discover, alone (except in one instance, to which I have alluded), but in the usual way, in vestry, with the parishioners. 5. Orders, that if churchwardens do not certify that the repairs are done, the case would be referred to the High Commission. 6. Instances of persons being punished for not paying the rate made by the vestry. 7. Several cases of interdict. But there is not one case of a rate made by the churchwardens and minority, much less a case where a rate so made was enforced. Recollecting the deep interest which this question of church-rates has excited, and what laborious and painful investigations have been made by the most learned persons, and that a question nicely divided from the present, intimately connected with it, has been adjudicated before twelve judges of the realm, and no ecclesiastical authority produced, I may, I think, venture to say that none is in existence. It would be mere waste of time to go over the books cited in former discussions, and I shall abstain from such fruitless toil.

Similar observations apply to any investigation into the Common law authorities:

* 1 Mod. 194, 236, & 2 Mod. 8.

MAY 4.
Veley v. Gosling.

None applica-
ble to present
case.

authorities of the common law. The judges say there are none applying to a rate made by churchwardens alone: had there been any applying to a rate made by churchwardens and a minority in vestry, they must have been produced. The solitary authority which had to be cited in support of a rate made by churchwardens alone, the anon. case in *Vestris*, has been disposed of by the Court of Error, so far as applied to the former *Braintree* case, and there is nothing but conjecture unsupported by facts to make it applicable to the present.

There is, then, no authority in the Ecclesiastical Courts or at common law to support this rate; but I am further of opinion that the authorities cited against the validity of the former rate have a strong application to the present case, and for this reason: all these authorities speak of a majority in vestry being necessary; all appear to assume that the very foundation of a rate is the resolution of the majority; not one speaks of, or hints at, a rate made by any other means (save by the churchwardens alone, a matter already disposed of) as possessing any validity. It would occupy time unnecessarily if I were to advert particularly to these authorities, which are to be found in the report of the former case, and in many able pamphlets which have been published on this subject.

In the total
absence of au-
thorities,

There being, then, in my opinion, a total absence of any authority, either in ecclesiastical or common law, in support of the validity of this rate, it is clear that upon such ground it cannot be supported, and if I were to enforce such a rate on such a supposition, I should be making law, and not declaring it, and that too in a matter in which every Court has been most cautious, namely, the imposition of a tax.

can the rate
be sustained by
analogy with
corporation
and election
law?

V. These preliminary considerations being disposed of, I now address myself to the last question,—namely, whether there being no authority in common or ecclesiastical law in support of the validity of this rate, it is, nevertheless, to be sustained by analogy to the law applicable in particular cases to corporations and elections. In applying my mind to this question, I feel the utmost distrust of my own ability to discuss or determine it with adequate learning or legal dis-

crimination. The branch of learning necessary to be known safely to understand the proposition, is wholly foreign to the practice and ordinary jurisprudence of these Courts, and if this doctrine be really the foundation on which such rates stand, it seems not a little extraordinary that it should for ages have been unknown to these Courts, to whose exclusive jurisdiction belong all causes for the recovery of church-rates. I do most strongly feel that this question belongs to Courts accustomed to cases of *mandamus* and *quo warranto*, and I distrust myself at every step I take regarding it.

MAY 4.

Velez v. Gosling.

In stating the proposition, I shall endeavour to use the words of the Court of Error :—"Members of a corporation aggregate, being assembled together for the purpose of choosing an officer of the corporation, the majority protest against and refuse altogether to proceed to any election; in which case, they throw away their votes, and the minority, who have performed their duty by voting, have been held to represent the whole number." On the same principle, it is contended that parishioners duly assembled in vestry for the purpose of making a church-rate wanted to defray the expense of repairing the church (and to this it may be added, that the vestry was called in pursuance of a Monition from the Ecclesiastical Court), the majority refusing, their votes are thrown away, and the rate made by the minority is good. To ascertain whether the two cases are analogous, two things are necessary: first, to understand the principle upon which the first proposition is supported at common law; secondly, to understand and compare the facts of the two propositions said to be analogous, in order to see if there be a real analogy between them.

The proposition in question.

The analogy supposed.

I must extract as well as I can the common law doctrine from the authorities (perhaps I ought more properly to say the only authority) cited; but before the comparison can with propriety be made, another task must be accomplished. Before I can trace the analogy between the cases of elections corporate or otherwise and church-rates, I must consider the legal origin and usages with regard to church-rates.

Preliminary question,—

History of church-rates.

MAY 4. Similarity or dissimilarity cannot be ascertained till the two things to be compared are both understood.
Veley v. Gosling.

Reluctant as I am to attempt to enter at large into the history of church-rates, yet, in order to compare the making of a church-rate with the election of an officer of a corporation, it is necessary that I should give an outline of what in my opinion church-rates are, and of the legal remedies for enforcing the repair of churches.

Parishioners
bound to repair
the nave of the
church.

The Stat. 13
Edw. 1, c. 1.

That the parishioners are bound to repair the nave of the church, is a proposition established by all authorities in all the books of ecclesiastical and common law; but with regard to the origin of that obligation, its nature, and the remedies for enforcing it, there is much room for difference of opinion. I do not venture (and it is not necessary) into paths proper to be trodden only by the learned antiquary; I look to the legal authorities alone. The Statute *Circumspecte Agatis*—and it now has, whatever it may have been originally, all the force and effect of a Statute—appears to me to establish fully these points:—1. That parishioners were accustomed, before the passing of that Statute, to repair the nave or body of the church. 2. That the Spiritual Courts in those days punished persons who refused to do so. 3. That the Temporal Courts had interfered by prohibition. 4. That by this Statute they were restrained from so doing: consequently, the legality of the obligation and the right of the Spiritual Courts to punish for not repairing were established by the statute law of the land. As to the nature of that obligation, nothing is said in the Statute; but all the authorities, from the earliest times to the present day, shew what it was. The whole nation in those times was of one religion; to profess a different opinion was heresy, a capital crime. To support that religion was a religious duty, binding upon the conscience of all, to secure the performance of rites deemed essential to the safety of the soul. Therefore, upon any account, the upholding of the sacred edifice by those bound to uphold it, and the religious nature of the obligation itself, gave the jurisdiction to enforce it to those Courts which arose out of, and were connected

with, the establishment for preserving the religion of the land, the foundation of whose proceedings was, and still is, *pro salute animarum*, and the jurisdiction was given to those Courts exclusively. There may be some difference of opinion on this point, but I am clearly convinced that the obligation was an obligation *in personam*, and not *in rem*; it existed independently of property, though, of course and necessarily, the extent and degree to which the obligation was to be enforced must be measured by property, or, in other words, by the ability of the individual. There could be neither religious, nor moral, nor equitable obligation to compel one individual to contribute in a greater ratio than another, and, therefore, ability was the standard. Ability included every species of property; it was a direct tax upon none. If I am correct in describing the nature of the obligation, it appears to me to follow that it did not necessarily attach more particularly upon any species of property; it was no *lien* upon land or stock, nor upon one more than another. In those days, however, land and stock constituted the sole property yielding a profit; therefore, land and stock became in practice a criterion of ability. If I am asked for authority as to these positions, I need only refer to those collected in *Prideaux** from John of Athon and Lyndwood. I might quote the opinion of the profession in *Doctors Commons* from the earliest period down to the present day, for in the *Poole* case,† scarcely twenty years back, it was decided by the authority of the Delegates, that, in ascertaining the ability, other property may be taken into consideration, as ships and stock in trade. With regard to land, it mattered not if the individual who occupied it lived out of the parish; he was an inhabitant by his occupation, and rateable to the church-rate, as well as liable to many other burthens and duties as an inhabitant.

I purpose next to consider the mode by which this obligation was carried into effect. The Statute *Circumspecte Agatis* is wholly silent as to church-rates. The expression, "to punish for that the church is uncovered, or not conve-

MAY 4.
Valeyn. Gosling.

Jurisdiction to enforce the obligation given to Spiritual Court.

The obligation *in personam*.

Property the measure of extent of obligation.

Mode of enforcing the obligation.

* P. 58 orig. Ed.: p. 73 Tyrhewitt's Ed.

† *Miller v. Bloomfield*, 2 Add. 30, 469.

MAY 4.
Veley v. Gosling.

Origin of
 church-rates.

The rate in-
 cidental to ob-
 ligation.

Remedies.

Obligation a
 religious one,
 on the con-
 science.

niently dected," affords no reason for supposing that church-rates then existed. I know not the origin of church-rates, nor any authority which fixes a date. The earliest case I am aware of is in the Year Books, in the time of Edward 3. But though there may be no direct evidence, their origin is most naturally accounted for. The legality of the usage of compelling the parishioners to repair, established by the Statute, naturally led to the ascertainment of the ability of those so bound. A rate made in vestry by themselves was the fairest and most equitable mode of measuring the liability. The rate was incidental to and followed upon the obligation: it matters little whether it is called a by-law, or not.

The question of remedies is an important branch of the consideration, and it appears to me, that all the remedies were in strict keeping and unison with the origin and nature of the obligation. They emanated from the Ecclesiastical Court alone, because the obligation was a religious obligation on the conscience, not a charge upon property, nor a common law obligation with regard to property, in the ordinary sense of that term. Before the Statute, the Spiritual Courts punished, as the Statute says; it does not say for not making rates, for *non constat* that rates existed; but because the repairs were left undone by those who ought to have done them. Such punishment must have been excommunication, and other ecclesiastical inflictions, and the imposition of fines, as far as we can infer from the Statute. There is still preserved in the *Register Brevium*, a Writ of Consultation,* recognized by Fitzherbert.† The terms of this Writ are given by Mr. Swan;‡ it was from the Court of Queen's Bench, and directed to the Bishop of Lincoln, and recites that it had been intimated to the Court that when the bishop was proceeding, according to his office, against R. de C., a parishioner, who had neglected or refused to aid in repairing the nave of the parish church, "of which defects the amendment and reparation are, by notorious and approved custom, known to belong to him and the other

* *Reg. Brev.* 44 a.

† *Nat. Brev.* 116.

‡ *Church Repairs and the Remedies for enforcing them* (1841), p. 13.

parishioners, to the danger of his soul, the evil example to others, and the great damage and injury of the aforesaid church;" that the bishop was desirous to proceed against the said R. "for the correction of his soul in the premises, and to determine to do what is just and expedient for the salvation of his soul, according to the canonical institutions; the said R. being anxious to decline your jurisdiction and the correction of his soul in the matter, and suggesting in our Chancery that he was impleaded before you in the Court Christian of a lay fee in C., has procured our Writ of Prohibition, to be directed to you, that you should not pursue that plea in the Court Christian; under which pretext you have discontinued to proceed in the aforesaid correction, to the great peril of his soul, and the manifest injury of the liberty of the church." The Court considered that the plea, that the party was impleaded of a lay fee, was not a sufficient ground on which to grant a prohibition, and the Writ of Consultation went to the bishop, to proceed against the party.

MAY 4.

Veleyv. Goshing.

Precisely a similar course of proceeding followed when rates had become usual and customary—criminal proceedings issuing from the Ecclesiastical Court—the result, interdict and excommunication of individuals. Looking at the consequences, both civil and spiritual, and to the writ *de excommunicato capiendo*, these remedies were all-powerful in those times, both with regard to the making and enforcing rates. Then came the Reformation, but no toleration. No one could then venture to offer resistance on the ground of a difference in religious opinions. Opposition was seldom offered, for not only the old remedies remained, but a new and most powerful engine for enforcing obedience was established—the High Commission Court, which was called into existence by the Stat. 1 Eliz., and continued to exercise its extraordinary power till annihilated by the Stat. 17 Car. I. Its authority was invoked for the purpose of compelling the repairs of churches, as appears from the 86th Canon, which directs all who have authority to hold visitations, to survey the churches once in every three years, and certify the High Commissioners for causes ecclesiastical.

The remedies
all-powerful in
early times.

The High
Commission
Court.

MAY 4.

Veley v. Gosling.

tical, every year, of such defects in any of the said churches as they may find remaining unrepaired, and the names and surnames of the parties faulty therein; upon which certificate, the High Commissioners were *ex officio mero* to send for such parties and compel them to obey the just and lawful decrees of such ecclesiastical ordinaries. Can any one doubt the efficiency of this tribunal, when its powers were administered *ex officio mero* by Archbishop Laud and his coadjutors? I think there can be no doubt of the existence of a perfect machinery at that time for enforcing the obligations of the law. After that Court had been deprived of its functions, the ordinary Ecclesiastical Courts still exercised the powers with which they were originally invested, for the most part (as appears from Mr. Hale's book, and other authorities)—I say for the most part—in the criminal, and not in the civil form, by proceedings *ex officio* and not in a church-rate cause: most of the precedents in Mr. Archdeacon Hale's book are criminal, not civil. That such powers were effectual for the purpose, up to a very late period, I think no one can doubt. True it is, the Courts were compelled, for the purpose of enforcing their authority, to resort in some degree to measures which were subsequently pronounced illegal, as the issuing of commissions to make church-rates; but all their original and legal forms remain to this time untouched by Statute: whether effectual now, it is not for me to say—into that question I must not now be led. They are not obsolete in law; they have a legal existence; but they never have been applied to enforce or punish for not paying such a rate as this.

The original
forms subsist.

Mandamus.

Before I quit this subject of remedies, I must, very unwillingly, speak of *mandamus*—unwillingly, because it is not a subject with which I am conversant, or which I can attempt to fathom; but it may have some connection with the analogy I am now endeavouring to examine. It has been said that a *mandamus*, to make a church-rate, has been refused, because church-rates are of ecclesiastical cognizance. What is the true meaning of this reason? I conceive that the history of the obligation to repair affords the true explanation; that church-rates are a mere incident to that obli-

Refused,

tion, which is of spiritual, not lay cognizance ; because that obligation is purely religious and binding upon the conscience, and therefore enforceable in the Ecclesiastical Court on that ground, which is the foundation of all its proceedings *pro salute animæ*.

MAY 4.
Veley v. Gosling.
because obligation a religious one.

Having thus, as briefly as I could with a just regard to perspicuity, stated my notion of the obligation to repair, and of the means of enforcing such obligation, I now proceed to consider the rules governing elections, in order to compare the two subjects. The case of *Oldham v. Wainwright* is cited, as establishing a doctrine which is said to be strictly analogous to the present case, and ought to decide the point in favour of the rate. Now, what are the facts of that case ? An election was to take place of a town-clerk for Nottingham : when the electors met, nine voted for Seagrave, and the majority present did not vote at all, considering the office to be filled, the mayor having nominated a person to that office. The majority, consisting of 11, protested against the election, but no other candidate was nominated. The Court of Queen's Bench decided that the mayor had no right to nominate that person to fill the office, and that the election of Mr. Seagrave was a good election, notwithstanding he was elected by a minority of the persons present. Now, it is quite manifest, that, with regard to the circumstances, it is impossible to conceive two cases more widely different than that case and the present ; but it may still afford some principle applicable to it. Upon what ground did Lord Mansfield decide in favour of Seagrave's election ? Upon a very clear and intelligible ground ; that the electors present, who did not vote at all, must be held to have virtually acquiesced in the election of those who did. Another principle adverted to in that case was, that at an election, those electors who vote for an unqualified person, with notice of his incapacity, throw away their votes. Now look at the present case. A vestry is held pursuant to a Monition from this Court, calling upon the parishioners to meet on a certain day and make a church-rate. The subject-matter is church-rate, and not the election of a corporation officer. The churchwardens propose a rate ; an amendment refusing the rate is proposed, put and

Election law.

Oldham v. Wainwright.

Inapplicable by analogy to the present case.

MAY 4. carried in the vestry, by a show of hands, and no poll is demanded; then the churchwardens produce a rate of 2s. in the pound, which is signed by the vicar, churchwardens, and several rate-payers; but this rate was not proposed to the vestry, nor put by the chairman to the vestry; for there was no voting of any kind after the show of hands had been taken. The two cases being thus totally different, I must now inquire whether such difference constitutes distinction.

Not in eadem materia.

Is an election of a corporate officer, or member of Parliament, in *eadem materia* with the making of a church-rate? It appears to me not to be so. In the case of an election, the act to be done is, choosing a qualified individual to supply a vacancy; discriminatory choice amongst qualified individuals is all that belongs to electors. An election, being begun, must be finished. The making a church-rate, under ordinary circumstances at least, involves many considerations; how is it possible to say, that, because a rate is proposed, it must be voted, or that, like an election, once begun, it must be finished by making some rate? Other considerations arise:—what repairs are necessary;—in what manner they shall be done;—whether the estimates be sufficient;—whether they shall be done at once;—whether one rate shall be made for the whole, or separate rates. Surely, even after this brief and imperfect comparison, it would be extremely difficult to say,—at least I cannot say—that an election and the making of a rate do not involve very distinct considerations. But compare the cases a little further. *Oldham v. Wainwright* was decided on the principle that the electors who did not vote for Seagrave did not vote at all and acquiesced in Seagrave's election. Acquiescence is the principle of Lord Mansfield. Could the same be predicated of this vestry? Did the majority not vote at all? They voted for the amendment refusing the rate; or, in other words, they in substance negatived the rate. Most clearly, then, they did vote on the subject-matter. To say, in the face of these proceedings, that they acquiesced in the making of the rate, would be to make a declaration in defiance of common sense and common reason. What is more, this

particular rate was not put to the vestry at all, after the amendment; it was made by the churchwardens and some individuals putting their names to it. Then if acquiescence be the principle which governed the case of *Oldham v. Wainwright*, it does not exist here; voting for the amendment is not acquiescence.

MAY 4.
Veley v. Gosling.

I will now notice another supposition, that though the majority did vote, their votes were thrown away, in the same manner as votes given for an unqualified candidate at an election, with notice of his want of qualification. Are all votes given against a church-rate thrown away, or only in some particular cases; and if so, in what cases? No one could contend that all votes against a church-rate are in all cases thrown away, for if it were so, it would be absurd to call a vestry for such a purpose. Are the votes thrown away because the repairs were wanting and a rate was necessary? Why, no rate made by a majority would be good unless these circumstances concur: *ergo*, all votes against all rates proposed when a legal necessity arises are thrown away. From this conclusion I can only escape by adopting the principle that a vestry is merely ministerial, without any discretion, a position for which there has been adduced neither argument nor authority.

Question,
whether the
votes of the
majority
thrown away.

Again, does any and what difference arise from the vestry being called in pursuance of a Monition calling upon the parish to meet and make a rate? That this Monition has been disobeyed is perfectly clear; but the question now is, not how obedience is to be enforced, or the parties disobeying punished, but whether a rate made by the minority is valid; whether the votes of the majority are thrown away. The act directed to be done by the parishioners is not done; the parishioners have not made a church-rate; some individuals have consented to this rate; can I hold this to be a substitute for what is considered the ordinary definition of a legal church-rate—a rate made by the majority of a vestry?

Here again I am compelled, much against my will, and with a full consciousness of my own inability accurately to understand or perspicuously to explain the analogy, to refer to proceedings at common law, in order to see if there does

Corporation
law.

MAY 4. exist any such analogy as that which has been attempted to be shewn.
Veley v. Gosting.

Suppose a *mandamus* to do an act ordinarily and legally done by certain persons composing a corporation—as to put a corporation seal; suppose part willing to obey, and part not. Could the Court of Queen's Bench accept the will of a part for the deed of the majority? Would it not compel the majority to do the act? Would it not be a bad return to say that part consented; or, if the return stated that the writ had been obeyed, would it not be a false return?

None of the principles or authorities applicable.

Having now considered, to the best of my ability, the analogy adverted to by the Court of Exchequer Chamber, as a question thereafter to be considered; the case of *Oldham v. Wainwright*, and the reference to the law of elections; the impression upon my mind is, that none of those principles or authorities are applicable to the present case. But even if I could discover similitude where I can see nothing but dissimilarity; even if the arguments appeared to me apposite to the subject-matter, instead of discrepant from it, I should still hesitate before I ventured, upon my own authority, as a judge of an inferior court, in a matter of taxing the subject, to introduce for the first time a doctrine hitherto unheard of in these courts, and, so far as I know, never applied to church-rates in any other. If this new doctrine be the law, it is a matter of extreme wonderment to me that, in the usage of centuries, when so many cases must have called for its application, when so many powerful minds have dedicated their learning and ingenuity to this question, it should first have been discovered in the year 1841; especially am I moved with astonishment when I recollect that this doctrine would have taken away all necessity for interdict, excommunication, and interposition on the part of the High Commission Court. A more easy remedy for the disease, a surer preventive against its recurrence, a more efficient substitute for the severer and harsher remedies which were formerly used, could not, I think, have been devised: yet, till the year 1841, though the necessity for the use of it must so often have occurred, there is in all the books, in all the reports on ecclesiastical and common

Presumption against the new doctrine from non-use.

law, *altum silentium* respecting this panacea. And not only is there no mention of this mode of making a valid church-rate, not even when once or twice reference has been made to rates made by churchwardens alone, but all the authorities, on the contrary, describe a church-rate as a rate made by a majority in vestry. Surely stronger presumptive proof against the admissibility of this analogy could not be adduced. It has, however, been argued, that admit it I must, for the ancient remedies are no longer fitted for the times we live in. That argument has been already answered by a higher authority, the Court of Queen's Bench; but if it had not, am I judicially to decide that that which the law has not altered is inefficient for its purpose, or extinguished as obsolete? Did the Court of King's Bench so treat the wager of battel in the case of *Ashford v. Thornton*,* though a more revolting or unchristian practice could not have been retained from the ages of the darkest barbarism? What said Lord Ellenborough? "The general law of the land is in favour of the wager of battel, and it is our duty to pronounce the law as it is, and not as we may wish it to be: whatever prejudices, therefore, may justly exist against this mode of trial, still, as it is the law of the land, the Court must pronounce judgment for it."

MAY 4.
Vesey v. Gosling.

Argument
that ancient
remedies un-
suited to the
times.

But if I were at liberty, notwithstanding, to pronounce ancient remedies inefficient or obsolete, could I invent a new one? Could I usurp the office of the Legislature, and *jus facere non dicere*? If I could consider the doctrine laid down as governing the case of elections to have an analogy to the present case, and I entertain no such opinion, I am bound to decide it, not by the rules of the common law, but by those of the ecclesiastical law; so says the Statute, and so says Lord Coke. Now, that this doctrine exists in the ecclesiastical law, or has been imported into it, by usage or otherwise, has never been attempted to be shewn: I cannot find the faintest trace of it. I am, therefore, of opinion that this rate, so made, is not supported by any authority to be found in ecclesiastical or common law, and that the supposed analogy between this proceeding and elections corporate or

* 1 B. & Ald. 460.

MAY 4. Parliamentary does not apply. It is, consequently, my duty to pronounce the rate invalid, and to reject the Libel.
Veley v. Gosling.

I am well aware of the heavy responsibility which has attached to me in the discharge of this arduous duty; I well know how many evil consequences, or supposed evil consequences, may be attributed to my miscarriage, if I have failed to discover the legal truth; but this I know also, that I have industriously, earnestly, and fearlessly, done my best to ascertain the law. Once convinced of what the law is, I never will be induced to resort to subtle and ingenious refinements to defeat that law, whatever may be, in the opinion of others, the pernicious consequences of adhering to it. I am well persuaded, from the history of this country, that the continuance of bad laws, and the prevention of good laws, have in no small measure been occasioned by laudable, though mistaken, endeavours to wrest the law to particular notions of justice and expediency, and, by the invention of subtle distinctions, to ward off evil and injurious results, which, if they be the effect of the law, ought to be remedied not by judges, but by the Legislature. I reject the Libel.

END OF EASTER TERM, AND THE SITTINGS
 AFTER TERM.

TRINITY TERM, 1842.

Prerogative Court of Canterbury.

MAY 27.

IN THE GOODS OF EDWARD COLMAN, DEC.—*Motion*.— A will executed in the presence of witnesses, who attested the same in an adjoining room, the door of communication being open, but in a situation where they could not be seen by the deceased, — held to be invalid.

The deceased, late of Norwich, died at Naples, 2nd April, 1842, a bachelor, his next of kin being an uncle and aunts. Having, with J. J. B., a friend, and F. C., a male servant, arrived at Naples on the 3rd March, and, about the 8th of that month, becoming ill of a fever, on the 24th, he expressed a wish to make his will, and his friend, J. J. B., applied to Capt. G., the British consul at Naples, who waited upon the deceased the next day (25th), and took his instructions for a will, about one o'clock in the afternoon; Capt. G. then withdrew, and, about five o'clock, returned with the will written out for execution, and was shewn (as before) into the deceased's bedroom, by J. J. B., and remained alone with him, J. J. B., as on his first visit, retiring. In about a quarter of an hour, J. J. B. and F. C., the servant, were called into the deceased's bedroom, out of the adjoining room, in which they both were, by Capt. G., for the purpose of seeing the deceased execute, and attesting the execution of, the will. As soon as J. J. B. and F. C. were in the bedroom, the deceased proceeded to execute his will by writing his name at the foot, and declaring the same to be his will, in their presence and that of Capt. G., all three present at the same time, the will being placed before him on the bed, and the deceased being propped up by pillows in bed to enable him to subscribe the will. The deceased appearing exhausted by the effort, Capt. G. intimated to

MAY 27. *Colman, dec.* J. J. B. and F. C., that they had better retire, and sign the will in the next room or *salon*, which they did, being wholly unacquainted with the requisites of the statute. The room in which they subscribed the will communicated with the deceased's bedroom by folding doors, each flap of the width of about eighteen inches, and at such time fastened back by strings; but the table in the room or *salon*, at which they signed the will, was so placed, relatively to the situation of the deceased's bed in the room adjoining, that it was wholly impossible for him to have seen the witnesses sign the will from his bed, in which he was not able even to turn himself without assistance. The value of the personal estate was £1,000; that of the real estate, £12,000.

MOTION. *Addams, D.*, moved for probate of the paper to the sole executor.

DECREE. *SIR H. JENNER FUST.*—No doubt, this was not a due execution within the statute. The deceased was in a situation which made it quite impossible that he could see the witnesses sign the will. If the rooms had been separated by a glass-door, and the deceased could have seen through it what the witnesses were doing—as in the case* where a lady sat in her carriage whilst her will was attested in an office, in which she might have seen it done,—the Statute might have been satisfied; but here he could not see the witnesses, and, therefore, the will was not attested in the presence of the deceased. The will is consequently invalid, and I reject the motion.

Addams, Proctor.

A paper signed by the deceased after the witnesses had signed it, and sealed after they had sealed, refused probate. **IN THE GOODS OF JAMES BYRD, DEC.**—*Motion.*—The deceased died in February, 1842, leaving a widow and two children, minors. On the 18th February, he gave instructions to his friend W. B. to draw a will for him, which he accordingly did; and, there being also present in the room the deceased's wife and T. F., the deceased, having approved of the will, desired to know how it was to be executed. No one present being acquainted with the form of

* *Casson v. Dade*, 1 Bro. C. C. 28.

execution, the deceased, after a short time, desired his wife to sign the paper, which she did; after which, W. B. and T. F. signed their names thereto. The deceased then affixed his signature to the paper, and declared it to be his will, all the persons before mentioned being present at the time. W. B. then suggested that seals should be placed against their several subscriptions, which the deceased assented to, and the deceased's wife, W. B., and T. F., placed their seals against their respective signatures; after which, the deceased placed his seal against his name, underneath the signatures of the witnesses.

MAY 27.
Byrd, dec.

Burnaby, D., in support of the motion for probate. The Motion. Court has decided in the case of *Olding*,* where the deceased signed his will after the witnesses had signed it, that the Statute had not been complied with. But in this case there was a subsequent act of recognition, by putting the seal. The Statute gives no direction as to the order of the acts.

SIR H. JENNER FURT.—Is there any real distinction between this case and the other? There was no actual acknowledgment. The construction I put upon the Statute, in these *ex parte* motions, is, that the witnesses must attest the signature previously affixed. I can see no distinction between this case and that which I have already decided: if there is supposed to be a distinction, let the paper be propounded, and the question be argued.

Motion rejected.

Cor, Proctor.

RENDALL v. RENDALL.—*Motion*.—Simon Rendall, the deceased, died 5th July, 1841, having made his will appointing his nephew, William Rendall, his sole executor. The will was made by Mr. J. Mogg, solicitor, the day before the deceased's death, and was attested by him and by the rector of the parish. The will was opposed by George Rendall, another nephew, the deceased having died a widower without child or parent, leaving a sister and ne-

A solicitor responsible to the Proctor for his costs, and whose incompetency on that ground was not discovered till after publication, not allowed to be released and re-examined.

* *Ante*, p. 169.

MAY 27.

*Rendall v.
Rendall.*

1841.

Aug. 3.

Nov. 26.

1842.

Feb. 3.

April 15.

phews and nieces. An Allegation was given in, upon which the two attesting witnesses were examined. An Allegation in opposition was admitted, on which witnesses were examined. A responsive Allegation was also admitted, on which witnesses were likewise examined. Publication was decreed, and the assignation upon the Proctors was to declare whether they would give any exceptive Allegations. On his cross-examination on the first Allegation, Mr. Mogg admitted that the Proctor for Wm. Rendall, the executor propounding the will, was in the first instance employed by him to conduct the cause in Wm. Rendall's behalf, whereby he had become responsible to the Proctor for his costs; that he apprehended he was still legally liable, and in the event of the executor failing to discharge the Proctor's bill, the Proctor would have a remedy against him and his partner for the amount.

MOTION.

Addams, for the executor, moved that Mr. Mogg be allowed to make affidavit that he had not seen the evidence, and that he had not, while giving his evidence, adverted to his own liability for the costs; then that he might be released from such liability, and re-examined. In *Allen v. McPherson*,* the witness admitted his liability, but stated that he had never adverted to it, and Mr. Mogg is prepared to depose to the same effect. As he has not seen the evidence, the motion is the same in effect as if made before publication. [PER CURIAM. In a later case,† the Court gave notice that, in such instances as this, it will not permit the witness to be re-examined. In this case, publication has passed, and the Proctor knows the depositions of the witnesses. Where a solicitor is examined as a witness, if he be responsible for costs, he must be released before his examination, otherwise, the party must take the consequences.] In the other case, application was not made till the cause came on for hearing; here, the application is made the moment the fact was known, and the witness is not acquainted with the evidence.

PER CUR.

Bayford, D., on the same side. The circumstances of this case being special, it comes within the exception of *Godrick*

* 2 Curt. 513.

† *Godrick v. Jones*, 2 Curt. 630.

v. *Jones*. Mr. Mogg, being an attesting witness, would be, under § 14 of the Statute, a competent witness to support the will, if the other witness died.

MAY 27.

*Rendall v.
Rendall.*

Sir John Dodson, Q. A., contra.—Under the rule of the Court, the witness is incompetent; the question is, whether there is any thing in this case to distinguish it from the others. In *Allen v. McPherson*, the witness doubted whether he was responsible or not; here he is clearly aware of his responsibility. It is said he has not seen the evidence; but the Proctor and other parties have seen it.

Jenner, D., on the same side.

SIR H. JENNER FUST.—The circumstances of this case JUDGMENT. are not such as to induce the Court to depart from the rule it has laid down, namely, that where a Proctor is retained by a solicitor, who is liable for his costs, unless he shall have been released, he is not to be considered a competent witness. The Court expressly laid down this rule, and declared it would refuse any application, unless under very special circumstances indeed, to release a witness who had been examined whilst responsible to the Proctor for costs. The rule in these cases.

In this case, the witness, on whom the Court would have been inclined to rely very much, from the candid manner in which he has answered the interrogatory as to his liability for the costs, was incompetent when examined. This did not appear till publication passed, when the Proctor who produced the witness, and to whom he was responsible for his costs, reading the depositions, and discovering his incompetency, writes to the witness (very properly), desiring him not to look at the depositions. I dare say Mr. Mogg could swear that he has not read any part of the depositions; but the Proctor was aware at the time of the rule of the Court, and of the witness's responsibility. Mr. Mogg is ready to swear that he did not depose with reference to his responsibility, and I dare say he did not, and I dare say, in other cases, where witnesses have been excepted to on the ground of interest, they deposed without reference to that interest. But can the Court act on such a supposition? I cannot see any ground for departing from the rule. The Proctor may have read the evidence, and may have found

Applicable to
the present.

MAY 27.

*Rendall v.
Rendall.*

§ 14 of the Stat.

that, without the testimony of this witness, he could not sustain the case, and with it he could sustain it, and he might or might not then determine to release the witness.

With regard to the clause of the Statute (14th), it merely enacts that a person, who may be incompetent to *prove* a will, is competent to *attest* it; that, though a person attesting a will may, at or after the execution, be incompetent to prove the execution, the will shall not on that account be invalid.

I reject the motion.

Proctors:—*Tebbs*, for the executor; *F. H. Dyke*, for George Rendall.

High Court of Admiralty.

MAY 31.

Bottomry.—
A bond op-
posed on the
ground that the
advances were
not made on
bottomry, and
that the trans-
actions were
suspicious, pro-
nounced for.

THE "ARIADNE."—*Act on Petition*.—This was a suit on a bottomry-bond, dated 19th June, 1841, the vessel being at that period at Calcutta, bound for London. The bond was for £853, and 12 per cent. interest for the voyage. The ship, on its arrival in this country, was arrested by the obligees, Bruce, Shand, and Co., of Calcutta, and an appearance was given for the Directors of the Maritime Assurance Company. In the Act on Petition, on their behalf, it was alleged that the vessel, which sailed from Scotland in September, 1840, on a voyage to Australia, thence to Calcutta and home, reached Calcutta in May, 1841; that, previously to February, 1841, Boggs, Taylor, and Co., were the mortgagees in possession of the ship, and despatched her on her voyage; that, in February, 1841, also, Mr. Wm. Shand, jun., being a partner in the firm of Boggs, Taylor, and Co., obtained from the General Maritime Assurance Company a loan of £5,000 on mortgage of the ship; that Mr. Wm. Shand, jun., who was a director of the Company, was also a partner in the house of Bruce, Shand, and Co. of Calcutta, to which house Boggs, Taylor, and Co., had consigned the vessel; that when the ship reached Calcutta

she was under the control of Bruce, Shand, and Co., who made all the necessary advances on the personal credit of Boggs, Taylor, and Co. ; that the master drew a bill upon that house for the advances made, being the sum covered by the bottomry-bond, executed only a few days before the ship left Calcutta, and which was resorted to by Bruce, Shand, and Co., on their being apprized of the mortgage of the ship to the Assurance Company ; that Boggs, Taylor, and Co. mortgaged the freight to Pirie and Co., without notice to the Assurance Company, to whom the vessel and freight was first mortgaged for £5,000 ; that the Company allowed the freight to be received in part by Pirie and Co., relying on the ship and remainder of the freight being sufficient security for the £5,000 advanced by them ; that the bottomry-bond was unduly concealed from them ; that the Assurance Company proceeded to the sale of the vessel, which arrived in London on the 7th November ; that, on the 21st December, a letter was received by the Company, apprizing them of the bond, which letter was from Wm. Shand and Co., of Glasgow, Wm. Shand being the father of Wm. Shand, jun., a partner in the house of Boggs, Taylor, and Co., and Bruce, Shand, and Co. ; and that Boggs, Taylor, and Co., stopped payment a few days before the 21st December. The greater part of the reply consists of denials. The leading facts are, that M'Lellan and Co., the owners, sent the vessel on her voyage in 1840 to Australia and Calcutta ; that Boggs, Taylor, and Co. were mortgagees only ; that M'Lellan and Co., the owners, had consigned her to the house of Bruce, Shand, and Co., when she should arrive at Calcutta, after performing the voyage to Australia ; that, in December, 1840, the house of M'Lellan and Co. failed ; that Boggs, Taylor, and Co. then sent a power of attorney to Mr. Stafford, to take possession of the vessel ; that he refused to make the advances which were necessary ; and that Bruce, Shand, and Co. were not aware of the mortgage to the Assurance Company when the bond was taken. The rejoinder states facts exclusively relating to the conduct of Mr. Wm. Shand, with reference to his dealings with the Assurance Company. The final statement on behalf of the bondholders concludes by

MAY 31.
The Ariadne.

MAY 31. an averment that a bill of exchange was accepted by Boggs Taylor, and Co., on the 14th September, 1841, before the ship arrived.

The Ariadne.

ARGUMENT.

Haggard, D., and Harding, D., for the bondholders.—There is nothing on the face of the bond, or in the transactions in which it originated, to affect its validity. The money was necessary to enable the vessel to put to sea; it was advanced for the use of the ship, and the bond was duly executed by the master.

Addams, D., and Bayford, D., for the General Maritime Assurance Company.—The essence of all these transactions is *good faith*, and the Court will give protection to parties induced improperly to part with their money. There is no evidence upon which the Court can pronounce this to be a

Good faith essential to bottomry transactions.

valid bottomry-bond. There is no averment that the expenses were incurred on the faith of a bond to be executed; and it was laid down by Mr. Baron Parke, in the Judicial Committee of the Privy Council, in the case of the "*Harsey*,"* that the expenses must have been incurred as with reference to a transaction of bottomry. The money in this case was not advanced to cover expenses incurred on the faith of a bottomry-bond. In all these cases, the necessities of the ship should be made known. It is not sufficient that the master should go to a particular person, and ask for money on bottomry at 12 per cent. The whole transaction is suspicious, from the connection of the parties and the conduct of Mr. Wm. Shand. *Jacaud v. French*;† *Bosquet v. Wray*.‡

This transaction suspicious.

JUDGMENT.

DR. LUSHINGTON.—It will make the grounds of opposition clear, if I recapitulate the facts as set forth in the general Act on Petition, and by the arguments of Counsel. First, that the bond was not originally a bottomry transaction; secondly, that, even if the money were advanced on bottomry, it was to pay debts already incurred to other persons; thirdly, that the conduct of Mr. Wm. Shand towards the Assurance Company, of which

Grounds of opposition.

* *Gore v. Gardner*, 6th February, 1840. Not rep.

† 12 East, 317.

‡ 6 Taunt. 597.

he was a director, was full of suspicion, and affects the house of Bruce, Shand, and Co., of which he was a member.

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The Ariadne.

With regard to the bond itself, there is *prima facie* no objection. The evidence in support of it, unless rebutted, is sufficient to sustain its validity : indeed, it is all that could be expected, unless evidence was brought from Calcutta, where the transaction took place. The affidavit of M'Leod, the master of the vessel, shews that she was originally under the control of Mr. M'Lellan, the owner, and in this he is supported by Mr. M'Lellan, who appears to have no interest in the present case, and certainly not according to the averment of those who oppose the bond, for they state that the mortgage to Boggs, Taylor, and Co. much exceeds the real value of the ship itself. The affidavit of M'Leod further states that he was consigned by M'Lellan to the house of Bruce, Shand, and Co., and that after the failure of M'Lellan and Co., he delivered the ship to Mr. Stafford. Now, I think this mode of proceeding cannot have been intended as a fraud on the Assurance Company, for the failure of M'Lellan and Co. took place in December, 1840 ; the power of attorney is sworn to have been immediately sent to Calcutta, and the loan from the Assurance Company was not negotiated till February, 1841. The bankruptcy of M'Lellan and Co. rendered the taking possession of the ship a very probable and a very prudent course ; so far as this transaction has any bearing on the case, I see nothing improper in it : the dates and circumstances satisfy me that the step was a proper one, and not in any degree to be impugned.

Evidence in support of the bond.

The next point is, as to the advances ; whether there was a probability that they would have been made by any other party on personal credit. Is there any improbability in Mr. Stafford refusing to make the advances which were necessary ? That some advances were necessary, the vessel having been a long voyage, cannot be doubted. The Court has no means whatever of ascertaining whether the master was originally supplied with funds. But he swears that Stafford refused to make advances, and considering that the house of Boggs, Taylor, and Co. were some seven or eight months afterwards

Whether the advances would have been made on personal credit.

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The Ariadne.

bankrupts, I cannot think there is any improbability in the statement.

But how stands the case with respect to Bruce, Shand, and Co.? It has been argued that they would be likely to make these advances, because Mr. Shand, jun., was a partner in that house, as well as in the house of Boggs, Taylor, and Co., who were interested in the ship as mortgagees originally, and as mortgagees in possession at the time the money was borrowed. *Prima facie*, it does appear probable that that firm, on being applied to by the master, might have made the requisite advances on the personal credit of Boggs, Taylor, and Co., because Mr. William Shand, jun., was a partner in both houses, Boggs, Taylor, and Co., and Bruce, Shand, and Co. But I cannot take this probability against the oath of the master, who swears positively that "he had no credit or means of procuring such sum at Calcutta other than the hypothecation of the barque, and that the barque could not have sailed from the said port on her intended voyage unless the sum had been advanced and paid for that purpose." I think it is impossible, according to those principles which must govern every case of bottomry, seeing that there is no reason to impeach the credit due to the master, or to attribute any misconduct to him on the spot, to do otherwise than give credence to his affidavit. There may have been very many reasons why Bruce, Shand, and Co. should have been unwilling to advance money on the personal credit and security of Boggs, Taylor, and Co.; the very connection through Wm. Shand may have apprized them that it was not safe to do so, and the firm at Calcutta would naturally look to their own interest, and not be guided exclusively by a regard to their connection with Mr. William Shand, jun.

It has, however, been distinctly alleged, on behalf of the opposers of the bond, that Bruce, Shand, and Co., having made advances on personal security, afterwards received information of the loan from the Assurance Company, and then converted it into a bottomry transaction. Of this averment there is no proof whatever. But if it were to be assumed that Boggs, Taylor, and Co., or Mr. Wm. Shand, the father, did acquaint

Bruce and Co. with the loan from the Assurance Company, then it appears to me that such fact would be strongly in favour of a bottomry transaction, and not against it, and that for the very reason brought forward by those who oppose the validity of this bond. Look at the dates. The loan transaction was in February, and, in the ordinary course, information thereof must have reached Calcutta long before the arrival of the ship, and if such information would have been an inducement to convert advances on personal credit into bottomry, as is contended, it would have been at least as strong a motive for not advancing on personal credit at all, but on bottomry only. The ship arrived on the 14th May, and intelligence of the loan must have been received in March, certainly in April: I cannot possibly presume, without evidence, and against all probability, that it arrived after the advance and before the bond. I am clearly of opinion that there is nothing, as relates to this part of the transaction, which in the least degree invalidates the affidavit of the master, or is opposed to ordinary probability. In fact, the whole argument is founded upon an arbitrary assumption of dates, altogether without verification, or even *prima facie* correctness.

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First objection fails.

I have thus disposed of the first ground. With respect to the second, that a bottomry-bond cannot be taken for advances of money to pay debts already incurred to other persons, the question of law involved in this proposition is of great importance; and if Mr. Baron Parke expressed himself in the case of the "*Hersey*" to the effect which Dr. The "*Hersey*." Addams states, it would become me to see my way quite clear before I gave an opinion that should in any degree interfere with his. But I do not conceive it to be necessary for me to give any opinion with respect to this point. In the present case, there is no evidence either from the bond itself, which is in the ordinary form of bonds at Calcutta, or from the affidavit of the master, nor any averment in the Act on Petition, that the bond was granted for an advance of money to pay debts already incurred. I think the fair meaning of the bond, with the affidavit, does not substantiate the proposition. The bond in the case of the "*Hersey*"* was of a totally different tenor; it stated expressly that it

Second objection.

* 3 Hagg. A. R. 404.

MAY 31. was to pay certain debts; "that the master was on the point of proceeding to sea, and was justly indebted to persons in Hobart Town, in sums of money amounting altogether to £470." I am of opinion that the facts of the case do not raise the question of law, and that consequently the bond cannot be assailed upon that principle.

The Ariadne.

Objection also fails.

Third objection,

The third and last ground is the alleged conduct of Mr. Wm. Shand, at the time of applying to the Assurance-office for the loan, and with regard to the freight. Now, assume, for the purpose of argument only, that all the facts alleged against Mr. Wm. Shand are true, and then see how the case will stand. Assume that the loan was obtained by Mr. Wm. Shand on a false pretence, for the benefit of Boggs, Taylor, and Co.; by what legal possibility could such a transaction affect the house of Bruce, Shand, and Co., though Wm. Shand was a partner in both? It may be a circumstance of suspicion, but it is impossible to make it legal proof. How could the mere circumstance of Mr. Wm. Shand being a partner of Boggs, Taylor, and Co., obtaining a loan from the Assurance Company, affect the house at Calcutta, the two firms being totally distinct? After considering the question as carefully as I could, I cannot find why it should. It appears to me that the argument against the bond has gone on the presumption that the houses of Boggs, Taylor, and Co., and Bruce, Shand, and Co. were one and the same, and had the same interest. But the fact is not so. It is difficult to understand why the house of Bruce and Co., acting in Calcutta—Mr. William Shand not being present—should incur risk by advancing money on account of Boggs, Taylor, and Co. Nothing is more common than for a person to be a partner in two or three concerns, as ship-owners, merchants, and bankers, and yet the firms be different, and the interests distinct. I remember a case in the Prerogative Court, thirty years ago, in which it appeared that one of the persons concerned in the suit was a partner in no less than six of the most important houses in this metropolis.

also fails.

I must make one further observation. Has the Assurance-office experienced any loss by this bond, beyond what might not unnaturally have arisen from the nature of the security they took? They took a frail security, which they knew

might be overridden by a bottomry-bond at any time ; nay, they knew that the ship could not come home unless Boggs, Taylor, and Co. could find funds for the expenses at Calcutta—expenses, to a certain extent, ordinarily necessary ; and if they had not funds, there must be a bond. From the very commencement, the Assurance Company trusted to the credit of Boggs, Taylor, and Co., to the extent of the expense of bringing the ship home ; they have been unable to fulfil their engagement, and they have failed. On what principle of law or equity is it that Bruce and Co. should bear this loss ? They had no motive for encountering the risk ; they did not encounter it as the Assurance Company did, perhaps a little too hastily, on the representation of a person who was a director.

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I, therefore, am of opinion, that the whole of these averments contained in the Act on Petition, and all the arguments founded upon them, are based upon an erroneous presumption, both of law and of fact : of law, that Bruce, Shand, and Co. can be held responsible for the acts of Mr. William Shand, a partner in their firm, acting as a partner in the firm of Boggs, Taylor, and Co. ; of fact, in presuming that the two firms had one and the same interest.

Objections
based on erro-
neous pre-
sumption.

With regard to the bill of exchange, I am of opinion that it was not necessary it should be mentioned in the bond, and the acceptance of that bill accounts for the house at Glasgow not sooner proceeding against the ship. It has been argued that the bill of exchange was the real, and the bond the collateral security. But that argument goes to the utter destruction of all the doctrines laid down upon the subject of taking a bill of exchange, and a bottomry-bond also ; because the usual course is to present a bill of exchange, and, if you have reason to believe that it will be paid, you do not put your bond in suit. But when the expression is used that a bottomry-bond is a primary, and a bill of exchange a collateral security, it means this, and this only ; that the transaction was originally a bottomry security, and, for the facility of merchants, a bill of exchange is added as another mode of security. Now, certainly, although there is a close connection between all these parties, I am not at liberty to assume that Shand and Co., of Glasgow, had a fraudulent

Bill of Ex-
change.

MAY 31.
The Ariadne,

intention in not disclosing the fact that they held a bond. In order to affect Shand and Co. of Glasgow, I must presume that Wm. Shand, jun., communicated to that house the probable failure of Boggs, Taylor, and Co. But even if they did know of the probable failure of Boggs, Taylor, and Co., I am of opinion that there is nothing in that conduct to affect the bond, the property of Bruce, Shand, and Co., and I do not think that they were bound to precipitate the fall of Boggs, Taylor, and Co., by putting the bond in suit before it became certain that the bill would not be paid, and it could not be certain till the house had actually failed. For these reasons, I am of opinion that it is my duty to pronounce for this bond, and I pronounce for it accordingly.*

Proctors:—*Nicholson* for the bondholders; *Smale* for the opposers of the bond.

* The following Note of a Judgment of the late SIR JOHN NICHOLL (*penes Editorem*), in the case of the "*St. CATHERINE*," November 27th, 1835, may illustrate the law of bottomry transactions, in circumstances in some respects analogous:

JUDGMENT.

SIR JOHN NICHOLL.—This is a suit to enforce the payment of a bottomry-bond. The party bringing the suit is Mr. Willis, of Liverpool, agent of Messrs. John and Phineas Williston, merchants of Miramichi, and it is brought against the vessel and freight. The vessel was arrested, and an appearance was given for the assignees and creditors of the owner, Mr. William Austin Grocock, of London, who had become a bankrupt before the execution of the bond. The bond is for £899, and bears twenty per cent. maritime interest, amounting together to about £1,000, and it is dated the 26th November, 1834.

The facts and dates of the transaction out of which the bottomry-bond arose, are material. There is nothing on the face of the bond itself calculated to affect its validity. From the evidence, it appears that, on the 1st September, 1834, the ship, which is of the burthen of 194 tons, was chartered at Liverpool, to Messrs. Willis and Swainson, as the agents of Messrs. Williston, of Miramichi, on a voyage from Liverpool to Miramichi and back again, with a cargo of timber. The vessel accordingly sailed on the 7th of September, William Sinclair being appointed to the command of the vessel by Messrs. Willis and Swainson, with the privity and approbation of Mr. Grocock, the owner. On the 6th September, the Charterers sent a letter of instructions to the master, directing him, on his arrival at Miramichi, to apply to Messrs. Williston; telling him that they would give him all possible despatch (it being late in the season when the vessel sailed), and that they would pay the necessary disbursements,—the bills are directed to be sent through them; but the

Charterers

JUNE 3.

THE "VOLANT."—*Act on Petition.*—Two colliers, the *Beatitude*, coming up the river, laden, and the *Volant*, going down, in ballast, came in collision, in the Swin, on the night of the 26th February, and the *Beatitude* was run down. In the action for the loss, the Court was assisted at the hearing by Trinity Masters,* who were of opinion that the *Volant* was entirely to blame, having carried too great a press of sail, and not having adopted the proper measures to avoid the collision. The Court accordingly (May 25th) pronounced for the damage; whereupon,

Addams, D., for the owners of the *Beatitude*, moved the Court to pronounce not only against the vessel, but against the master and part-owner, as the value of the vessel would be insufficient to pay the damage.

Collision.—Where the damage sued and pronounced for exceeds the value of the ship and freight, this Court cannot engraft a personal action against the owners, or against the master part-owner, of the vessel doing the damage, upon a proceeding originally in rem.

Charterers say, in the letter, that they expect he will use the utmost despatch and economy; and they give him a copy of the Charter-party. On the same day (the 6th of September), Messrs. Willis and Swainson wrote a letter of advice to Messrs. Williston, at Miramichi, desiring them to watch the conduct of Sinclair, the master, who had been recently appointed to the command of the vessel; telling them that, when he had to pay bills, it was to be through them; and it is particularly mentioned in the letter, "for reimbursement you will draw on Mr. Austin Groocock, of London:" so that for the small sums of expense which might be incurred at Miramichi, they were not to draw upon the Charterers, Messrs. Willis and Swainson, but upon the owner. In the latter part of the voyage, more particularly, the vessel met with tempestuous weather,—on the 10th or the 11th October. She was dismasted, suffered severely in her rigging and hull, and on her arrival at Miramichi, the master applied to Messrs. Williston, and on the 23rd October, made his protest. A survey of the vessel was recommended (which was very proper), and, accordingly, it was surveyed by three merchants, and repairs were recommended. The damaged rigging was sold as useless, and the vessel was repaired and put in a condition to fit her for returning to Europe, agreeably to the Charter-party. She received these repairs with all possible despatch, which was necessary at the latter end of October, for there was danger, in the Gulf of St. Lawrence, of being detained by the ice, and of incurring loss by remaining during the winter. The vessel was repaired by advances made, and the bills were paid by the Willistons of Miramichi; they were completed by the end of November, when the vessel was ready for sea. Accounts were regularly drawn out, and there

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* Captain Rees and Capt. Fitzroy.

JUNE 3.
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The Volant.

Sir John Dodson, Q. A., for the owners of the *Volant*, cited the "*Hope*,"* 1840, in which the Court (the present Judge) refused, in a similar case, to engraft a personal action on a proceeding *in rem*.

Addams cited the *Triune*,† in which *Sir John Nicholl*

are vouchers for each bill that was paid; there cannot be more regular accounts than these which are annexed to the protest of the master, and which were sent to the owner. The accounts are not made out as against Messrs. Williston, but against Mr. Grocock, the owner of the vessel; they are headed, "The owner of the brig *St. Catherine*, and all concerned, to John and Phinehas Williston, for repairs and supplies and necessities provided for the said vessel." Under the first column are the dates of the bills, and other columns appear to be appropriated to the dates of the vouchers; and amongst other dates, are several on the 25th November, and the total is £765. 10s. 5d., with a commission of 5 per cent., and the net proceeds of the stores sold are deducted. So that it is impossible to desire an account more fully and fairly made out; and the account is dated the 26th of November. On the same day, a letter was written by those persons, by whom the advances were made, to their correspondents at Liverpool, and in the letter was enclosed the bottomry-bond, which was also dated the 26th November, and executed in triplicate. A bill of exchange was signed in triplicate on the same day; a special messenger was sent with the enclosure, containing the bottomry-bond and the bill of exchange (one of the three), to a port at a little distance, to forward them to Liverpool by the earliest conveyance. If these are facts, it is difficult to conceive how this should not be a valid bottomry-bond, or that the whole transaction is not perfectly fair and honest on the part of the merchants at Miramichi, who took the bond for the advances they made.

But it has been contended that the advances were not made on the credit of the ship or of the owner, but on the credit of Messrs. Willis and Swainson only. On what possible ground can it be contended that Messrs. Willis and Swainson had undertaken to be responsible for these advances? They had undertaken to be responsible for no advances; in their letter of advice, they desired their correspondents to keep a sharp look-out on the master, and to pay necessary expenses, and the whole of these expenses they expected would amount to about £35 or £40: and even for this small sum, they were not to draw upon Willis and Swainson, but upon the owner in London. How could it be supposed, under these circumstances, that these persons at Miramichi would advance £800 for the repairs of this vessel, and look only to their correspondents at Liverpool for repayment of this sum, when for the small sum they were authorized to advance, they were to look

to the

* 1 Rob. jun. 154.

† 3 Hagg. A. R. 114.

granted a Monition against the master and part-owner, to pay the damage caused by the vessel he commanded, and upon his failing to do so, he was imprisoned on an attachment.

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The Volant.

to the owner? And the whole course of the transaction shews, that the advances were made on the credit of the ship alone. The only credit of Willis and Swainson was to the extent of £35. The Willistons had no knowledge of the owner of the ship; they had no knowledge of the master—he was a new man. On what possible ground can it be supposed that persons in these circumstances would have made advances without the credit of the ship, and without a bottomry-bond? It has been said that there was no mention of a bottomry-bond till the vessel had sailed, when, having met with an accident in the river, getting aground, and being obliged to be got off, the master came on shore, and then, for the first time, he was asked for a bottomry-bond. This is asserted by the master, but it is incredible in itself, and the master has contradicted himself in some of his assertions; for he has said that the bond was executed on the 28th; then he goes back, and says it was on the 27th, after he went ashore to complete his protest; whereas all the facts and letters shew that the instrument was executed on the 26th. But it is said the master was not told of it till the time of execution. This is denied and expressly contradicted by the affidavits of Mr. Williston, his clerk, and the Notary, Carman, who all depose the same way, though not *totidem verbis*, which serves to confirm each other, and to shew the fairness of the transaction, and the knowledge of the master that a bottomry-bond was to be taken: it is, therefore, an after-thought, and not, I think, entitled to any credit. Looking to the facts of the case, considering the utter improbability that advances would be made on any other credit than that of the ship, the state of the ship, and the fairness of the conduct of the party, who, in their letter, declared that they were not desirous of taking advantage of the maritime interest, and that, if the bills of exchange were accepted, they were willing to receive the sum they were out of pocket, provided they were secured by an early conveyance, otherwise they would rely upon the bond—there is nothing which is not perfectly honest and liberal on the part of the merchants. Where money is actually wanted for the repair of a vessel in a foreign port, where the master is without credit, and where there has been no extortion, it is the duty of the Court, and it is for the interests of commerce, that bottomry-bonds should be strongly upheld. What might have been the consequence if the correspondents of the charterers at Miramichi had not made this liberal advance of money? Why the vessel might have been laid up all the winter, and could not have fulfilled her Charter-party. As to the information of the bankruptcy of Grocock arriving at Miramichi prior to the execution of the

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PER CURIAM.—I have no doubt that this Court has jurisdiction to proceed against the owner of the vessel personally, and that it can compel the owner to pay the amount of the damage done; but the question is, whether, when you proceed against the vessel in the first instance, you can engraft on that proceeding a personal action against the owner. I shall reserve my judgment till next Court day.

Cur. adv. vult.

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JUDGMENT.

Facts of the
case.

DR. LUSHINGTON.—The question to be decided in this case is no doubt attended with some difficulty, and is of very considerable importance. An action of damage was entered by the owners of the *Beatitude*, in the sum of £2,200, and a warrant of arrest was extracted and duly executed upon the *Volant*, the vessel alleged to have caused the damage. An appearance was given on behalf of the owners of the *Volant*, and bail for £825, but the ship was alleged and admitted to be of the value of £675 only. It appears that the *Volant* is owned by five persons, one being the master, who was on board and in command at the time of the collision. The appearance was given on behalf of all the owners. The damage much exceeds the amount of the bail and value of the *Volant*. The question is, whether this Court can, under these circumstances, enforce the payment of damages beyond the amount for which bail has been given—namely, the value of the vessel.

bond, the Court is called upon to infer this from the affidavit of Mr. Sanders. But the very statement he makes satisfies me that the information of the bankruptcy of Grocock had not arrived at Miramichi on the 26th November. There is certainly a possibility of its having arrived; but that the London Gazette had reached Miramichi, or any thing but extracts from English newspapers, through foreign newspapers, or that any information of the bankruptcy of Grocock had been received, is disproved, I think, by the facts and circumstances. I am not quite prepared to say that, if the information had arrived, the party who had advanced the money might not have been at liberty to resort to a bottomry-bond. But it is not necessary to give any opinion upon that point. The assignees of the estate cannot be placed in a better situation than the owner himself was; and the owner was bound by the act of the master when he hypothecated the vessel in a foreign port. I am quite satisfied that the bond was given for a fair consideration, and that it is a valid bond. I therefore pronounce for the bond, in favour of the holder, and for the expenses incurred in recovering its payment.

There are two cases, decided in this Court, which have been cited as bearing on the point. The first is the case of the "*Triune*," decided by Sir John Nicholl. The "*Triune*" had been arrested, and no bail given; but an appearance was given on behalf of the master and principal owner. Before the hearing of the cause, the Court was moved to decree a warrant of arrest against the master, as master and owner, on board at the time of the collision, on affidavit that the value of the ship run down exceeded the value of the ship arrested. The Court refused to decree such warrant, but subsequently, on the hearing of the cause, pronounced that the master and principal owner of the "*Triune*" was liable for the damage, and condemned him, the vessel, and her freight, in the damage and costs. The ship having been sold, there was a deficiency of £400; a Monition was decreed against the owner for that sum, and subsequently he was attached. Now, it must be recollected that the appearance to the action was given for the master and principal owner solely; that no bail was given in that case; and that Sir John Nicholl asked if there was any precedent for a warrant of arrest against the owner, at the time that such warrant was moved for; and lastly, that, when he decreed the attachment to issue, he assigned no reasons and cited no case for such his determination. The other case, which occurred during the time I have filled the chair, is that of the "*Hope*." An appearance to that action was given for three persons resident in Scotland, as part-owners, who gave bail to answer the action generally. The damage was between £1,300 and £1,400, the value of the "*Hope*" £810, and the bail £1,500. The master was part-owner, and was on board at the time of the collision, and the loss arose from his own default or misconduct. It was alleged that the master was personally responsible for the difference between the value of the ship and the damage done. The case of the "*Triune*" was not referred to. I was not aware of that decision; and I was of opinion that the motion could not be granted. There was certainly some difference between the facts in the "*Triune*" and the "*Hope*;" but I do not know that they are of any material importance. Looking at all which

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*The Volant.*The "*Triune*."The "*Hope*."

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has previously occurred, and seeing there has been this difference between my predecessor and myself (though I was not aware of that judgment), I think it is my duty to consider the question as an open one, and to give that decision which now, upon consideration, I deem most conformable to law, not holding myself bound by either precedent; though feeling that, had I been aware of the "*Triase*," I might have hesitated before I determined the "*Hope*" in the manner I did determine it, in opposition to the decision of Sir John Nicholl.

By ancient
 maritime law,
 owners of ves-
 sels damaged
 might recover
 whole amount.

To consider the question on principle. By the ancient maritime law, the owners of the vessel doing the damage were bound to make it good, though the amount of that damage might infinitely exceed the value of their own vessel and her freight. The owners of the vessel damaged might resort to a Court of common law, or to the Court of Admiralty. At common law, they might have recovered the whole damages; if they preferred coming to the Court of Admiralty, they had their choice of three modes of proceeding, either against the owner, or the master, personally, or against the ship itself. This Court has jurisdiction over the whole subject-matter of damage on the high seas, and the arrest of the vessel is only one mode of proceeding.

Forms of
 action.

The damage is not, in the proper sense of the term, a *res* upon the vessel doing it, and the arrest is the mode which is most generally resorted to for the purpose of obtaining compensation, because it offers the greatest security for ready payment. There are many cases in which it might be advisable to proceed in this Court, indeed, when there could be no other effectual remedy, though the ship could not be arrested. Take the case of a vessel run down, especially a foreigner; it might be impossible to arrest the vessel which did the damage; she might have gone to some distant part of the world. It might be almost equally impossible to bring, with effect, an action at law, for the crew might be on the eve of dispersing, or the expenses of bringing them together to give evidence might be too onerous to be borne. Looking at the experience of past times, and having examined, with some care, the records of this Court, I know

Personal
 action.

of no reason why an action could not be maintained under such circumstances in this Court, though the ship could not be arrested. Again ; suppose the case of a ship doing the damage to sink, or be lost, immediately after the collision. The jurisdiction does not arise from, or depend upon, the existence of the ship, but on the question to be decided—the origin of the cause, and its locality. If the proceeding be against the owners, then the whole damage sought, as limited by the Act of Parliament, may be recovered ; but the parties suing must depend upon the power of the owners to pay, and the effect of an attachment issuing from this Court.

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Now, look at the proceeding by arrest of the ship. First, Proceeding by arrest of ship. it is clear that, if no appearance be given to the warrant arresting the ship, there can be no proceedings against the owners. The Court cannot even know who they are ; it cannot exercise any power over persons not only not before the Court, but never personally called or cited to appear ; its decree must of necessity be confined to the ship exclusively. Next consider the case where there is an appearance, and bail is given ; against the bail, the liability cannot be extended beyond the amount for which they (strangers to the case) have voluntarily made themselves responsible. But in such a case, where bail is given, the owner has appeared ; but the question is, to what extent, and for what purpose ? He has appeared to a process against the ship, and it is material to see how that process is worded. It directs that the ship should be arrested, and that you cite the parties, and all persons in general, “ who have, or pretend to have, any right, title, or interest therein, to appear before the Judge of our High Court of Admiralty in England, in a cause of damage, civil and maritime.” The owners are only called to answer, therefore, with respect to any right, title, or interest they have in the vessel, and when they appear, they intervene for their interest in the vessel, and no further. Now, would it be possible that bail upon such a warrant could be insisted upon beyond the value of the ship ? I think not ; but if the process were personal against the owners, to make them personally re-

When owners appear, only for their interest in the vessel.

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Neither bail
nor owner lia-
ble beyond its
value.

sponsible for the damage done with the privity or through the fault of the owners themselves, I know no reason why the bail should not be commensurate with the damage—that is, in those cases where the amount of the responsibility of the owners is not restricted by the Statute. Then, if bail could not be demanded beyond the value of the ship—I am speaking of a case of arrest of the ship—why should the owner in that mode of proceeding be made responsible to a greater extent, he who has been cited only and exclusively with respect to his interest in the vessel? The warrant of arrest is confined to the ship; it goes no further. It appears to me, therefore, that no personal liability beyond that value could be engrafted upon such a mode of proceeding, and for this obvious reason: that, if I were to engraft such personal responsibility upon the owner, the original process would not justify such proceeding. Not only the original process, but the appearance given by the individual himself, would not justify it, because he has appeared only to protect his interest in the ship, both by the form of the warrant and the form of his appearance.

Wilson v.
Dickson.

I should be of this opinion, even independently of a case which I now think it my duty to examine with some particularity; I mean the case, decided in 1818, of *Wilson v. Dickson*.^{*} That was an action against several defendants, as ship-owners, for damage sustained by the loss of goods laden on board their ship; and it is by the 1st section of 58 Geo. 3, c. 159, that the responsibility of owners is limited, both with respect to the loss of goods carried, or damage done to any other ships or goods. There is no distinction between the two cases, because the Statute applies precisely in the same manner to the case of goods carried on board a vessel and receiving damage, as to any damage which may be done by that vessel to another. There is the same limit in both cases, *viz.*, the value of the ship and freight, where the act is done “without the fault or privity of such owner or owners.” The question (amongst others) in that case was, whether the defendants, the co-owners, were liable

^{*} 2 Barn. and Ald. 2.

beyond the value of the ship and freight, by reason that the master was a part-owner, and the loss was occasioned by his misconduct. The Court of King's Bench determined in favour of the defendants; and, in giving judgment, Bayley, J., said: "It seems to me that the meaning of that clause is, that, if the master be a part-owner, his responsibility, if you sue him in his character of master, and not as one of several part-owners, will not be affected by the first section of the Act;" or, in other words, that, if he were to be sued simply as master doing the damage, there would be no limit to his responsibility but the amount of the damage itself; "but if you sue him as one of the part-owners with the other part-owners, the circumstance of the loss being occasioned by his fault, and with his privity, will not take away from the other part-owners the protection which the first section of the Statute intended to give to them." Now, in words, he confines his observation, by saying, "you do not take away from the other part-owners the protection of the Statute;" but in substance and effect, by the decision in that case, the master, who was sued as one of the part-owners, and through whose misconduct the loss arose, was equally protected by this decision; the decision was in favour of all the owners, the master included. There is not, indeed, precisely the same form of action in this Court, but the principle which governed that decision appears to me very applicable in justice to the present case. I am of opinion that, to render the master, being a part-owner, and being guilty of neglect, or privity to misconduct, responsible beyond the value of the ship and freight, you must sue him as master in the first instance, or, perhaps, you might sue him as part-owner. But you must set out by charging him with being the cause of the damage by his misconduct. Now, most clearly that has not been done in this case, either directly or indirectly; for, as I have already observed, the original proceeding was by a warrant against the ship, which merely gave him notice to appear for his interest in the ship, if he thought fit. And, again; in this case, the appearance given is for all the owners, and not for the master only; they are all co-defendants, and I think I cannot select one on whom

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Per Bayley, J.

To render master, part-owner, liable beyond the value of the ship, he must be sued as master or part-owner in the first instance.

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to fix the responsibility where several are united in the defence. I, however, more strongly rely, as a ground of my decision, upon the other reason, *vis.*, that the master was not personally sued at all in this form of proceeding. Suppose no bail is given, in all ordinary cases, may not the owners abandon the ship, and can the Court do more than sell it for the benefit of the plaintiff? If they choose to appear, no further liability can be imposed, save as to costs; and it is now settled by the decision of the Court of Queen's Bench, that, with respect to costs, this Court has the power to decree them, and necessarily so on authority and principle; for every person who appears in a Court must and ought to be liable—if the Court thinks that justice requires it—to be condemned in the payment of costs. Had any other decision been come to, what would have been the consequence? If the owners were limited merely to the payment of the value of the ship itself, whatever might have been the amount of costs incurred, it would have been their interest, as their liability was so limited, to have litigated every case, and have deprived persons of their fair indemnity.

Damage limited to value of ship.

Costs.

For these reasons, I pronounce for the damage; but I cannot enforce the payment of that damage beyond the value of the ship and freight; and I condemn the owners, who have appeared, in the costs incurred by this proceeding.

Proctors:—*F. Clarkson* for the *Volant*; *Stokes* for the *Restitude*.

Prerogative Court of Canterbury.

JUNE 6.

Where a party in the cause dies prior to the execution of a requisition for examination of witnesses abroad, the examination must recommence from the date of the party's death.

BEST v. FINLAY.—*Motion.*—This was a business of proving the last will of J. W. Parkins, who died in America, by the sole executor, against the deceased's sister. Before the requisitions for examination of witnesses abroad had been executed, both the parties had died, and *Addams* moved that the evidence taken after the death of one of them might, with consent of the present parties, be received.

SIR H. JENNER FUST.—Can any agreement between

parties make that legal evidence which is not so? No indictment for perjury would lie. The Court would, if possible, save the expense, but it cannot be a party to such an agreement. You must recommence from the time when one of the parties died.

JUNE 6.

Best v. Finlay.

SOAR v. DOLMAN AND OTHERS.—*Motion.*—C. N. Rippin, the testator, died 9th January, 1839, having duly executed a will, dated 19th November, 1838, whereof he appointed J. D., H. J. T., and G. K., executors. In December, 1838, he shewed the will to J. D., one of the executors, at which time it contained a legacy of £50 to his servant, S. S., but after his death it was discovered that the testator had diminished such legacy, by erasing and altering the word “fifty” to “thirty,” but without the attestation required by the Act. On affidavit of the amount of the legacy as it stood at the time of execution, the Court was moved, on the 19th of March, 1842, to grant probate of the paper with the word “fifty,” as originally written; but such word not being apparent on the face of the will, the Court was of opinion,* under the 21st sect. of the Act, that the legacy was lost altogether, and decreed probate with the amount of this legacy in blank. Subsequent to this decree, the case of *Brooke v. Kent*† was decided by the Judicial Committee of the Privy Council, under the authority of which the legatee applied to the executors to bring in the probate and shew cause why the blank therein should not be filled up with the word “fifty.” The executors, to save expense, by special proxy, authorized their Proctor to bring in the probate and consent to such insertion.

Haggard, D., moved that the word “thirty,” in the original will, might be altered to “fifty,” and that the blank in the probate might be supplied with the word “fifty.”

SIR H. JENNER FUST.—The Court is now at liberty, under the construction of the 21st clause of the Act, to receive evidence *aliunde*, which was the only difficulty it had on the former occasion. Previous to the decision in the case

* *In re C. N. Rippin*, 2 Curt. 333.† See *ante*, 93.

JUNE 6. of *Brooke v. Kent*, the Court had held, on its construction of the Act, that if the word erased was not apparent on the face of the will itself, it could not receive evidence *aliunde*. In that case, the testator had erased a legacy with a knife,

Intention of testator to be ascertained by evidence *aliunde*. and substituted a reduced sum, and the Judicial Committee being of opinion that, as the testator had no intention to revoke the legacy altogether, but only to substitute another amount, the intention of the testator being ascertained as under the old law, by evidence *aliunde*, they pronounced for the will as it originally stood. In this case, the Court has no reason to doubt that the sum was originally "fifty" pounds, one of the executors who prays probate of the will having seen in it after execution a legacy of £50 to S. S.; I think, therefore, that, under the authority of *Brooke v. Kent*, the legacy of £50 may stand. It would have been more satisfactory to the Court if the paper had been propounded in an Allegation; but as the legacy is too small to justify the putting the party to the expense of so trying the question, I direct the probate to be altered, and the blank to be filled up with the word "fifty." But I have some doubt as to the alteration of the will itself, which was not done in *Brooke v. Kent*. [*Haggard*.—It was not done, as the question was debated on an Allegation, and the Court had not the original paper before them. *Sir John Dodson*, as *am. cur.*—On the face of the document itself, it would appear at all times, there being a memorandum in the deceased's own hand.] Still, the paper was not altered, and I should hesitate a good while before I directed an alteration in the will itself. At present, there is no immediate necessity for it. Let the word "fifty" be inserted in the probate.

Probate to be altered; but

not the will itself.

Proctors:—*Moore* for the legatee; *Jennings* for the executors.

An executor substituted by a surviving executor for an executor deceased (in pursuance of the will of) **IN THE GOODS OF PRISCILLA DEIGHMAN, WIDOW, DEC.**
—*Motion*.—The deceased died 4th June, 1826, having by her will, dated 11th March, 1825, nominated J. P. and J. I. executors, who, in June, 1826, proved the will, and intermeddled in the effects. Both had since died, leaving some

part of the effects unadministered. J. I. survived his co-executor, and died 13th January, 1842, intestate. The deceased, in her will, directed as follows: "Also should one executor die, the survivor to choose another, to the best of his judgment, and so to continue, to the true intent and meaning of two executors." By an indenture, dated 7th January, 1834, between J. I., the surviving executor, and J. G. P., after reciting that J. P. (the other executor) had deceased, it was witnessed that J. I., in pursuance of the power given to him by the will of the deceased, nominated, substituted, and appointed the said J. G. P. to be an executor of the said will, in the place of J. P. deceased, to act in conjunction with J. I. in like manner as if J. G. P. had been appointed an executor by the will of the deceased. J. G. P., however, never took probate in the life-time of J. I.

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Deichman, dec.
 the testatrix), but who did not take probate during the life of the executor who appointed him, held to be entitled to claim probate, and to appoint a co-executor, the will requiring two.

Addams, D., moved for administration, with will annexed, Motion.
 to be granted to Priscilla Marshall, niece, next of kin, and one of the principal or residuary legatees for life named in the will, the deed in respect to the executorship having become effete, since the deceased contemplated two executors, which direction could not now be complied with.

SIR H. JENNER FURT.—The object of the deceased was, DECREE.
 that there should be two executors of her will, and on the death of one, the survivor exercised the power of nominating another; but the party nominated did not take probate during the life of the surviving executor; he now, however, is ready to take probate, and he being substituted executor, there does not appear to be any solid reason on principle why he should not have probate of the paper now, though he did not take probate at the time when the other executor lived. It is suggested that, by the construction of the Rolls Court, in the case of *Frances Ashton*, deceased, in January, 1835, such appointments, though called executors, are to be regarded as trustees only. But there is a material difference between the cases. In this will, no trust is created; the executors are to pay certain parties for life, and the survivor is to keep the whole property. My opinion is, that J. G. P. is entitled to the probate, and afterwards to

Substituted executor entitled to probate, and to nominate another.

JUNE 6. nominate another executor to act in conjunction with him,
 ——— and I therefore decree probate to him.
Deichman, dec. *Addams, Proctor.*

A codicil, *MACKENZIE v. YEO.*—*Cause.*—This was a business of
 forthcoming af- proving in solemn form of law an alleged codicil to the will
 ter the death of the testator of Mr. George Acland Barbor, late of Fremington, Devon,
 from the pos- who died at Frankfort, 7th July, 1839, a bachelor, aged 39,
 session of the party benefited, leaving personal property to the amount of between £3,000
 the execution and £4,000, and a real estate of the net value of £2,500 per
 proved by one annum. By his will, dated 15th October, 1830, he be-
 of the attesting witnesses (the queathed the bulk of this property to his cousin germane
 other being dis- and only next of kin, Dr. William Arundell Yeo, whom
 qualified by in- he appointed sole executor and residuary legatee, and who
 terest), resisted proved the same 27th August, 1839. In December, he was
 on the ground called upon to take probate of the paper in question, pur-
 of fraud,—pro- porting to be a codicil in favour of Anne Melton (now Mac-
 nounced kensie, the wife of Tom Dight Mackenzie), bearing date
 against.—Pri- 6th July, 1838, and to the following effect :
 vileged com- munications.

The codicil.

This is to certify, that I, George Acland Barbor, of Fremington, in the county of Devon, Esquire, do give and bequeath to Ann Melton, of Barnstaple, in the county of Devon, spinster, the sum of five thousand pounds, of good and lawful money of Great Britain, in consideration of injuries and sufferings sustained by her through certain false and calumnious reports caused by me; the same to be paid to the said Ann Melton within six months after my death, should she survive me; but should the said Ann Melton die before me, then this shall be of none effect. And I fully authorize and command my heirs, executors, and administrators, each and every of them, to receive and view this in every respect as a codicil to my last will and testament, and discharge it accordingly.

This paper purported to be signed by the deceased, in the presence of two witnesses, Tom Dight Mackenzie and George Lake.

Pleas.

The *Conditit*.

The paper was consequently propounded by Mrs. Mackenzie (who had married one of the witnesses) in a *Conditit*, which pleaded—

That the testator, meaning to benefit Anne Melton, then present with him, began to write the codicil with his own hand; but being at such time in a nervous state, after writing the first two words, "This is," told Anne Melton to complete it from his dictation, and she thereupon wrote the same; that it was then read over to or by the testator, who executed it.

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—
Mackenzie v.
Yeo.

The Allegation on the part of Dr. Yeo pleaded that the deceased's death was notorious at Barnstaple shortly after the event, and was communicated to Anne Melton, Mr. Mackenzie, or their solicitor, W. G., prior to or very shortly after 20th July, 1839; that, from 1822 to 1837, W. L. or his partner, T. H. L., of Barnstaple, was the confidential solicitor of the testator, who was in the habit of consulting with them unreservedly upon his private affairs, and was ignorant of law forms and phraseology; that, in 1826, the testator formed an illicit connection with A. M. S., who lived with him and passed as his wife, and by whom he had two children, one of whom still lived; that by a bond, dated in 1828, prepared by W. L., the testator settled upon A. M. S. £300 per annum for her life, and by his will bequeathed her an additional annuity of £200 for life, and directed that £3,000 should be invested for the benefit of their child; that, in 1834, the testator formed an illicit connection with Anne Melton (party in the cause), who kept a day-school at Barnstaple, which connection continued till May, 1838, when the testator went to Bath, upon his return from whence, in June, 1838, he entirely broke it off; that, during such illicit connection, Anne Melton became acquainted with Tom Dight Mackenzie, a musician in poor circumstances, who, in May, 1838, wrote letters to the testator upon the subject of his connection with Anne Melton, declared that she had lost her school through his (the testator's) means, abused him, and threatened to take his life if he did not make reparation to Anne Melton, with whom he (Mackenzie) declared he had formed an engagement, believing her to be virtuous and correct; that, on the 26th June, 1838, the testator called upon T. H. L., and informed him of his connection with Anne Melton, and of the application of Mr. Mackenzie to make a provision for her, and instructed T. H. L. to prepare a bond securing the payment of £60 per annum to her during life, which he afterwards told T. H. L. he had agreed to increase to £80, the sum to be actually paid her, but that, at her desire, he had consented to give her a bond for £100 a year, that she might shew it to her friends, and a bond for £100 was accordingly prepared by T. H. L., and executed by the testator; that, in August, 1838, Anne Melton married T. D. Mackenzie, who claimed

The Counter-
Allegation.

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Mackenzie v.
Yeo.

the full amount of £100 under the bond, denying the agreement that £80 was the sum to be actually received, at which the testator testified great surprise and anger, and, being compelled to pay the full amount of £100, expressed the most marked aversion towards the Mackenzies, calling them by opprobrious names, and complaining of their dishonest conduct; that, in May, 1839, the testator went abroad, and at the time of his death was residing with A. M. S. and their daughter, and that in his unreserved and confidential communications to an intimate friend, and to T. H. L., he never mentioned the execution of any codicil; that whilst the will was in the course of being proved, W. G., the agent or solicitor of Mrs. Mackenzie, inquired of T. H. L. whether her name was mentioned in the will, on which occasion he did not allude to any codicil left by the deceased; that, on the 25th November, the same agent, on a further application to T. H. L. to know whether there was any codicil to the will, and being told there was none, then said there was a codicil in Mrs. Mackenzie's possession, but refused to state the contents, prior to which date, no suggestion was ever made to Dr. Yeo, to T. H. L., his solicitor, or to any person on his behalf, that the deceased had left any testamentary paper save his will; that, on the 9th December, 1839, for the first time, the contents of the alleged codicil were disclosed to T. H. L.; that, during the connection of the testator with Anne Melton, the latter was in the habit of imitating his signature, and that the words "This is" at the commencement, and the signature at the end, of the alleged codicil, were not in the handwriting of the deceased.

Responsive
 Allegation.

A responsive Allegation, on behalf of Mrs. Mackenzie, counter-pleaded that part of the adverse Allegation which represented that the testator was angered at the misunderstanding respecting the amount of the bond, and various circumstances pleaded in relation thereto; it pleaded that his death became first known to Mrs. Mackenzie on the 27th July, and on the 2nd August she wrote to W. G. (a copy of the letter being exhibited), requesting him to obtain a sight of his will, "observing the date, and if any mention be made of a codicil which she held;" but if this was premature, to act as his better judgment might dictate; that W. G. replied, by return of post, that he considered it too early to make the application, but would take a fitting opportunity to do so; that, not having heard from him on the 23rd November, she enclosed to him a copy of the codicil, and on the day following its receipt (25th November), he communicated the fact to T. H. L., and forwarded the codicil to his Proctor on the 27th; and it counter-

pleaded the Allegation that Mrs. Mackenzie was in the habit of imitating the testator's signature.

JUNE 6.

*Mackenzie v.**Yeo.*

Mr. T. D. Mackenzie, having married the legatee, was held to be disqualified to give evidence in support of the paper.

Sir John Dodson, Q.A., for Mrs. Mackenzie.—I have a preliminary objection, as to certain omissions in the evidence.

1841.
Nov. 6.

ARGUMENT.

On interrogatory, Mr. T. H. L. says :

I saw the boy Lake at Exeter; when I learned from W. G.'s letter in December, 1839, that the codicil was lodged in Doctors' Commons, where it could be seen, I wrote to my agents about it, and they having procured a copy of the codicil, and sent it to me, I made inquiry as to who George Lake was, and where I could find him, and having at length traced him to Exeter, I went there to him, and saw him: that was before the cause began, and it was to enable me to advise Dr. Yeo as to the course to be taken on his behalf.

Answers to
interrogatories.

I have had only one interview with George Lake; the object was to inquire of him all that he knew respecting the codicil. It was on the 17th December, at Exeter. I have a memorandum of what passed on that occasion, and from that, better than from recollection, I could state what passed between George Lake and myself; but I doubt if it would be right in me either to give up the account, or state its contents, since it belongs to my client: I acted as his solicitor on that occasion. [The witness was then told that the production of the paper was called for on the part of the Ministrant by her Proctor.] That I do not consider to be enough; if called for on the authority of the Court, I should consider myself bound to comply.—Being now told by the Examiner that I ought not to withhold the paper, I give it up, subject to any order of the Court respecting it. [The paper was brought in, sealed up.]

Mr. C. H. T., of Exeter, attorney-at-law, was, I believe, consulted by the Producent (Dr. Yeo), and employed by him to make some inquiries in Exeter touching the boy George Lake, and to communicate with me if he saw occasion so to do, the object being only an investigation of the circumstances of the case, and to ascertain, if possible, the truth of it. I received some letters, three or four, as I recollect, from Mr. T. on the subject, but I cannot consent to give them up; I have no right to part with them. I submit that what I have done in my professional cha-

JUNE 6. racter, as solicitor of the Producent, is not a proper subject of inquiry.

Mackenzie v. Yeo.

Witness's privilege gone by his production as a witness.

Extent of privilege.

Exceptions.

I submit that we are entitled to have the memorandum made by T. H. L., of his interview with Lake, and the letters addressed by Mr. T. to T. H. L., as to the character of Lake. The privilege of T. H. L. is gone by his production as a witness in the cause, and these documents are essential to the ends of justice. *Vaillant v. Dodemead.**

Addams, D., on the same side.—Mr. T. H. L., having been examined as a witness, has waived his privilege; but if otherwise, cases in the books shew that he is not privileged. *Phillipps Ev.†* Privilege extends to confidential communications between attorney and client; but the matters came to Mr. L.'s knowledge before a suit was depending. There are also exceptions, amongst which are these: "the attorney of a party in the cause may be examined, like any other witness, where he has made himself a party to the transaction"—Mr. L. has done so, by going down to examine Lake—"or where he is questioned to a collateral fact, within his own knowledge"—this is a collateral fact—"or to a fact which he might have known without being entrusted as attorney in the cause," which is the case here. There are other *omissa* in the evidence of Mr. L. He refers to letters he received from the deceased respecting Miss Melton, which he has not produced.

Haggard, D., for the executor.—There is a protection thrown over confidential advisers in respect to all matters relating to their clients. Mr. L. has answered as far as the interests of his client permitted, and he ought not to be compelled to give his opponents undue advantage by producing documents which came into his possession in the course of his professional engagement, whether before or after the suit commenced: the privilege extends over all matters before or since. *Clark v. Clark;‡ Greenough v. Gaskell.§* The memorandum of what fell from Lake is no more than hearsay. As to the letters from Mr. T.,

* 2 Atk. 524.

† 2 Moo. and M. 3.

‡ 1 vol. c. 6.

§ 1 Myl. and K. 98.

they are privileged communications, coming from the agent of the solicitor. *Curling v. Perring*;* *Hughes v. Biddulph*.† If Mr. L. had, in his examination in chief, stated the substance of his conversation with Lake, it would have been different. He is only cross-examined as to the fact of his having had such a conversation in the course of his professional employment. An attorney is not considered to have waived his privilege by being produced as a witness. *Vailant v. Dodemead*.

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Yeo.

Jenner, D., on the same side, cited in addition *Lloyd v. Lloyd*.‡

SIR H. JENNER FUST.—If Mr. L. is bound to produce his communications with parties before the commencement of the suit, it will cause great mischief in the proceedings of this Court, and destroy all confidence between the Proctor and the agents he employs to make inquiries.

The papers referred to, which are prayed to be brought into the Registry, for examination, may be classed under three heads: 1. Two letters, in the testator's handwriting, addressed to Mr. L., and referring to the preparation of the bond for a settlement on Miss Melton. 2. The letters of Mr. T. to Mr. L. 3. A memorandum or writing by Mr. L. of communications made by the witness Lake. These papers may be subject to different considerations, but, it said, they are all of the nature of confidential communications between his client (Dr. Yeo) and himself, in regard to proceedings in this cause, and, as such, are privileged, and could not be made evidence if disclosed; that the Court is not to suffer the witness, if inclined, to reveal what is so communicated to him. It cannot be denied that, as a general principle, a solicitor is not compelled, and ought not, to disclose what is confidentially communicated by his client to him in his character of solicitor, as Mr. Phillipps lays it down, "at any period of time." The only question is, therefore, whether these communications fall within the rule.

There are qualifications of the rule. An attorney may be examined as to a fact which he knew before he was consulted in his professional character; or which he knows col-

* 2 Myl. and K. 380.

† 4 Russ. 190.

‡ 2 Curt. 262.

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Per Lord
Cottenham.

laterally, and was not communicated by his client; or where he has made himself a party, as a witness to the execution of a deed. It is almost impossible to lay down any general rule as to the extent to which the privilege should be allowed, and cases will sometimes occur in which the distinctions are very nice. Lord Cottenham, in *Desborough v. Rawlins*,* recognizes this difficulty. That was a case in which two Insurance Offices were so far in opposition to each other that one (the Eagle) was desirous of insuring a particular life in another (the Economic), which was desirous of obtaining information with respect to that life, and one of the defendants, the solicitor of the party insured, was present at a meeting of an officer of each, and in his answer to the bill he refused to state what passed, because he was then the solicitor of the party insured, and acquired the information touching the matters solely from being present in the capacity of the professional and confidential adviser of the insured. But it was held that the privilege did not extend to this communication. The Lord Chancellor observed: "It is very difficult to suppose how that could be the subject of privileged communication between the officer of the Eagle Company and the solicitor of the same Company; it was a communication from an adverse party. If it had been made directly to the solicitor, for the purpose of being communicated to the Company, it would not be very easy to consider it as a privileged communication. Both *Bramwell v. Lucas*,† and *Greenough v. Gaskell*, shew that the privilege only applies to cases in which the client makes a communication to his solicitor with a view to obtaining his legal advice." A similar observation was made by Lord Brougham in *Greenough v. Gaskell*.

Result.

The result of all the cases I take to be this: that an attorney is not to be compelled to disclose what has come solely and entirely to his knowledge in his professional capacity by or on behalf of his client, from his client, directly or intermediately: the object of privilege being to secure to a party the benefit of secrecy in confidential communications with his legal adviser. Therefore, a rule may be laid

The rule.

* 3 Myl. and C. 515.

† 2 B. and C. 745.

down to this extent ; that, to bring a communication within the privilege, it must be shewn that the matter came to the attorney's knowledge directly or intermediately through another person from the client himself, and that, as to matters which came to his knowledge collaterally, he is bound to answer.

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Yeo.

Now it is clear that Mr. L. was acting as the solicitor of Dr. Yeo when he went to one of the subscribed witnesses to the will, and received a communication from him (before the proceedings had actually commenced), which paper he declines to deliver up, and the question is, whether this was a privileged communication, which it would be a breach of professional confidence to disclose. I have considerable difficulty in holding this to be a confidential communication, for there was no privity between Dr. Yeo and the witness Lake. If Dr. Yeo had questioned the witness and communicated the answer to Mr. L., that would be a privileged communication ; but this was from a collateral quarter, and Mr. L. may be called upon to divulge it without any violation of professional confidence between him and his client. The paper is annexed to his deposition, sealed up, and if the case had ended here, I should be inclined to be of opinion that the paper ought to be opened ; but I think a still more serious objection exists—namely, that, if we had the paper, we could make no use of it as evidence in the cause. It is no evidence that Lake informed Mr. L. to the same effect as in his examination. Mr. L. is not called to prove that the witness gave a different representation ;—there is no plea to that effect ; the paper is desired merely to corroborate Lake's testimony, by shewing that he gave the same account as he has deposed to : it is impossible to suppose that the account in the paper is different from his testimony, or it is clear that it would have been produced. Mrs. MacKenzie, therefore, is entitled to the full benefit of the presumption that the testimony given by Lake is consistent with the account he gave to Mr. L. I am of opinion that I ought not to direct the paper to be opened.

Memorandum
 not privileged ;

but not evidence.

With regard to the letters of Mr. T., they, I think, are very differently circumstanced from the memorandum, and

The letters
 privileged.

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that they come strictly within the meaning of "confidential communications." Dr. Yeo employs Mr. L. generally as his professional adviser in the cause; Mr. L. resides at Barnstaple, and inquiries are necessary at Exeter, where the witness resides, and Dr. Yeo also employs Mr. T. to make those inquiries, with directions to communicate the result to Mr. L. Dr. Yeo is, therefore, their mutual client, and it is consequently a professional communication from that client to Mr. L., acting in his professional capacity, through the medium of Mr. T., also acting in his professional capacity. Dr. Yeo employs both solicitors in different places, with directions to communicate from one to the other. I am of opinion, therefore, that these are privileged communications, and that the witness is not at liberty to divulge them. Moreover, there would be, perhaps, a stronger objection to the use of these letters as evidence, than to that of the memorandum; they are letters from a person who has not been examined, and therefore the party is not entitled to have those letters brought in.

The notes
 not privileged;

In respect to the two notes from the deceased to Mr. L., with reference to the bond, it can hardly be considered that they are confidential communications between client and solicitor—that is, between Dr. Yeo and Mr. L., for they were written before the latter was retained by Dr. Yeo as his solicitor, and I should consider that they are documents which he is not privileged to withhold, and which would be very properly called for, as they relate to a bond the execution of which Mr. L. is examined to prove; but he says "they are not in my possession now," and he was not asked where they are. I am of opinion that this answer is sufficient, and I reject the application of the Proctor for Mrs. Mackenzie, and direct the cause to proceed.

but not in the
 witness's pos-
 session.

Application
 rejected.

ARGUMENT.

Sir John Dodson, Q. A.—I submit that, notwithstanding that the Court has shut out the evidence of Mr. Mackenzie,* one of the attesting witnesses to this codicil, on the ground that he has since married the legatee—and the Court has consequently not the benefit of his evidence as to what passed previous to and at the time when the codicil was exe-

* See 2 Curt. 512.

cuted—there is the clear and unimpeached testimony of a witness as to all the necessary parts of the case—the perfect approval of the paper by the testator, his knowledge of the contents, and its voluntary execution by him. The case on the other side is one of forgery, supported by witnesses whose opinion is founded upon handwriting; whose evidence, if it were not conflicting, cannot be taken against positive facts sworn to by a person of unimpeached character, who was present and saw the testator execute the paper. The rest of the evidence against the codicil is mere surmise and conjecture as to the improbability of the legacy. The phraseology of the instrument is objected to, since the testator was ignorant of the technical terms of the law; but although some technical terms are used, it is just such an instrument as would have come from such a person as the deceased.

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Addams, D., on the same side.

Nov. 22.

Haggard, D.—The party for whom I appear, Dr. Yeo, is of opinion that this is not a genuine paper. The only direct evidence in its favour is that of a single witness, a lad, seventeen years of age, and the question is, whether, in opposition to circumstances and probabilities, and evidence as to handwriting, that is sufficient to support such a paper. I submit that it must be pronounced against, with costs.

Nov. 26.
 Dec. 1.

Jenner, D., on the same side.

Dec. 6.

SIR H. JENNER FUST.—The codicil in question is admitted to be (except two words of it) in the handwriting of Mrs. Mackenzie, the legatee; it is pleaded to have been executed in her presence, and that of Mr. Mackenzie and George Lake. The evidence of Mr. Mackenzie has been properly objected to, and excluded, on the ground of interest; the evidence of execution, and, in fact, the whole case, therefore, depend upon the single testimony of Lake, a witness described as *omni exceptione major*.

1842.
 June 3.
 JUDGMENT.

Case depends
 on one witness.

The codicil was not produced to Dr. Yeo till three months after probate of the will had been obtained by him; and to be sure, a codicil of this description (abstracted from other considerations) must have created very considerable surprise in his mind, from the fact that, although the per-

Conduct of
 the legatee.

JUNE 6. sonal property was only £4,000, a legacy of £5,000 was bequeathed by it to this lady, and he naturally made inquiries respecting the persons by whom the codicil purported to be attested. Lake, who then resided at Exeter, was applied to, and he gave information (as I infer) to the effect stated in his deposition. It has been said that Dr. Yeo ought to have been satisfied, by the account so given by Lake, as the case then stood (divested of all other circumstances), as to the genuineness of the codicil; but I do not say that, with the knowledge which Dr. Yeo and Mr. L. possessed at the time from other friends of the deceased, of the circumstances connected with the relation between the deceased and Miss Melton, they ought to have been satisfied, and I think they were fully entitled to prosecute the inquiries to the extent they have done.

Mackenzie v. Yeo.
Of the executor.

(After detailing the history and character of the deceased, and his connection with the legatee.)

Nature of the evidence required.

The *onus probandi*.

Now in all these cases, where the question is, not as to the sanity or capacity of the deceased, but whether the act was done or not, all the circumstances, probable and improbable, are to be taken into consideration before the Court can make up its mind; and the *onus probandi* is *primâ facie* on the party who sets up the paper, to prove, as far as the case admits, that it is the act of the deceased, and not on the party opposing it to shew that it is not his act. *Sepp v. Atkinson*.* The question is, what is the extent of proof required, and whether the *onus* is discharged by the testimony of one witness deposing positively to the fact of execution, where it is impossible for the Court to give credit to that person with reference to all the circumstances before it.

(After detailing the evidence respecting the provision made for Anne Melton, in June, 1838, and the circumstances connected with the disputed amount of the annuity; the breaking off the connection between the deceased and her; the proceedings of Mr. Mackenzie, and the sentiments of the deceased regarding his conduct and that of Miss Melton; and after commenting upon the improbability that he should have given the latter, by a codicil, so

* 2 Add. 162.

large a sum as £5,000 ; upon the absence of any one circumstance of probability to lead up to the codicil, and upon the inconsistency of such an act with the conduct of the deceased.)

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As the Court has been deprived by his own act of the evidence of Mr. Mackenzie, as to the circumstances attending and leading up to the execution of this codicil, on what does it rest? Why, upon the evidence of a boy of seventeen. But before I consider the testimony he has given of the transaction, let me look at the substance and complexion of the paper, and what it purports to be ; because the effect of the evidence of a single witness to the execution may depend greatly upon the paper itself. With the exception of two words, the paper, as I said, is all in the handwriting of the legatee. Passing over the legal terms, which were not likely to come from a person of the deceased's habits, the £5,000 is said to be given to Miss Melton "in consideration of injuries and sufferings sustained by her through certain false and calumnious reports caused by him." Is it probable or possible that Mr. Barbor would have dictated these words to Miss Melton at that time? What false and calumnious reports had he caused, and what could induce him to declare that he had caused such reports? Then, according to the plea and evidence, this paper was dictated by him at once, without hesitation, or stop, or correction. Looking at all the circumstances attending this paper, and at the face of the paper itself, the improbability of the act is so great, that it could hardly be supported by the evidence of a single attesting witness of the most unimpeached character, and I admit that there is no imputation upon the general character of Lake. He was a person living in a low situation, in 1838, at Barnstaple, where the transaction took place ; but I do not find that there was any intimacy or connection between him and Mr. Mackenzie or Miss Melton, and the account he gives, taken by itself, abstracted from other circumstances, is not improbable.

Character of
the paper itself.

Improbability
of the act.

He states that he was walking up the street, early in the afternoon, when Mr. Mackenzie, whom he had seen at his

Account of
the transaction
by Lake.

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 —
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master's shop, tapped at the window, and beckoned him in; that on his going into the room, Miss Melton was sitting at a table writing, and Mr. Barbor was standing behind her, looking over her shoulder; that she was not copying any other paper, but it appeared that Mr. Barbor was telling her what to say, but the witness did not hear distinctly what he said; that Mr. Mackenzie said to Mr. Barbor, "Here is a young man I know something of; have you any objection to his being a witness to this?" Mr. Barbor said, "No, not in the least;" that Miss Melton was writing all this time, Mr. Barbor still being behind her, looking over her shoulder; that when she had finished, in about two or three minutes (he was not there above five minutes altogether), the paper was read over by Miss Melton aloud, and was afterwards read over by Mr. Barbor, not so loud or distinctly as by her; that he heard some words, but not all; it was bequeathing £5,000 to her; that, without making any observation as to its contents, Mr. Barbor took the pen and wrote his name as he stood; that Mr. Mackenzie then wrote his name, and one or both said to the witness, "Now, young man," when he stepped forward and signed his name; that Mr. Barbor then gave him half a sovereign, and said, "Young man, I hope you will keep this to yourself, and say nothing about it to any one, as I do not wish it to be known." He adds, that the paper was in one respect not as it now is: "it was a whole sheet then, and it is but half a one now; I did not see the sheet spread open, but I saw enough to know that it was a whole sheet, and that there was writing, though I could not say of what kind, on the other half sheet." And it is stated that the bond, dated a few days before, was written on the other half sheet, which has been separated. Now I am not prepared to say, that if there had been nothing else in the case,

Candid and
 not improbable
per se;

but opposed to
 probabilities of
 the case.

this ought not to be considered a very candid statement; or that it is very improbable that such a transaction should have taken place; and the only question is, whether this boy's evidence is sufficient to satisfy the mind of the Court in opposition to the evidence I have detailed, shewing the

great improbability, and almost impossibility, that the deceased should have contemplated such a provision for this lady at that time, and given effect to it. I am not prepared to say that this is evidence upon which I can rely to that extent; that this boy's testimony is sufficient alone to support this instrument. The Court is not compelled in these cases to come to the conclusion, if it pronounces against the paper, that it is the result of fraud and forgery, supported by perjury and conspiracy; this Court has no such duty imposed upon it, but only to ascertain whether the evidence satisfies its mind that the instrument was the act of the testator.

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Yeo.

Not necessary
to affirm fraud
and perjury.

There is only another part of the case on which a very great body of evidence has been collected, gratuitously, as it seems to have been argued, on the part of Mrs. Mackenzie, inasmuch as she was not bound to prove that the signature to the codicil was actually in the handwriting of the deceased. It would, however, have been very difficult to support her case without some evidence of this kind. In this, as in all similar cases, some witnesses depose to their belief that the signature is in the handwriting of the deceased, whilst others depose that it is not, and the Court cannot determine a case of this kind on evidence of handwriting, unless from witnesses *omni exceptione majores*, who were fully acquainted with the improbability (not to say impossibility) of the whole transaction. If I were forced to decide, I should say that the balance of evidence is against its being the deceased's signature; but that is not the ground upon which I rest my opinion. I am bound to look at all the facts and circumstances of the case, and I am of opinion that I cannot place that reliance upon the testimony of Lake which will justify me in pronouncing that this is the act of the testator, and I cannot say that I am satisfied that the paper was signed by him.

Evidence as to
handwriting.

Not satisfactory.

Under these circumstances, I must pronounce against the validity of the paper; and looking at the nature of the transaction, as the party has propounded the paper for her own benefit, I am of opinion that she should do it at her own expense, and not cast the charge of opposing the paper

Paper pronounced
against,

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with costs.

upon the estate. I pronounce, therefore, against the validity of the codicil, and condemn Mr. and Mrs. Mackenzie in the costs.

Proctors:—*F. Clarkson*, for the legatee; *Buckton*, for the executor.

Consistory Court of London.

JUNE 8.

Divorce by reason of adultery. — Deficiency of direct proof of the marriage. *CRIPPS v. CRIPPS.*—*Cause.*—This was a suit for divorce by reason of adultery by the husband against the wife, grounded on her suit for restitution. There was no plea on the part of the wife, who had not interrogated the witnesses, and from the nature of the facts, the COURT called upon the Counsel for the wife to argue her case.

ARGUMENT.

No direct proof of marriage.

Secondary evidence, of handwriting, insufficient.

Cohabitation no evidence in this case.

Sir John Dodson, Q.A.—The first question is as to the proof of the marriage, and of the identity. That a marriage took place between two persons named Edward Cripps and Augusta Cullington there can be no doubt; but no person has been examined to prove the identity of the parties. It is alleged that no person was present at the marriage who knew the parties, and could prove their identity; but the marriage was recent, and there might have been a Decree of Confrontation. They undertake to supply this defect of proof by secondary evidence. They plead the handwriting. That of Mr. Cripps, I admit, is proved; but as to the alleged wife's, there is an insufficiency of proof: Mr. H. W. Cripps, the husband's brother, speaks only to the similarity of the handwriting of Mrs. Cripps.

Jenner, D., on the same side.—Four modes of proof are relied on for establishing the marriage: 1. cohabitation; 2. general reputation; 3. the confession of the party; 4. handwriting. Cohabitation in this case is not presumptive evidence of marriage, for the testimony goes to shew that the wife was a common prostitute. *Conran v. Lowe*.^{*} Lord Mansfield held that, in a penal action, general reputation is

^{*} 1 Lee's Rep. 630.

not sufficient. The admission of the party is not evidence in this penal case. The proof by handwriting is of too weak a character. JUNE 8.
Cripps v. Cripps.

Phillimore, D., for the husband, was stopped by the Court.

DR. LUSHINGTON.—I think it expedient, in the first instance, to look at the circumstances under which the marriage is alleged to have been contracted; and for this purpose I advert to the evidence of Mrs. Scott and of Henry William Cripps. The substance of their evidence is, that a lady, bearing the name of Augusta Cullington, lodged at Mrs. Scott's, in the beginning of the present year; that, during the time she resided there, she was visited by a great many gentlemen, who came to the house to inquire after her, as well before as after the marriage; that the other party, a bachelor of the age of nineteen, became acquainted with this lady, and a marriage took place on the 5th February last. The first and only question is, whether there is adequate and satisfactory proof to satisfy my mind that a marriage was had between the parties in this cause. It is expedient to bear in mind, that it is not a question whether a marriage took place or not, as in other cases; but the simple question is as to the identity of the parties to the marriage. The register proves that a marriage took place in St. Pancras Church on the 5th February, 1842, and the identity of the husband is established by satisfactory proof, that is, by the evidence of his handwriting. Then there is the additional testimony of Mrs. Scott to the effect that, from and after the marriage, the parties resided some days in her house and cohabited as husband and wife, and there cannot be a doubt that the person residing as Mr. Cripps in the house of Mrs. Scott is the party proceeding in this cause. Now it appears to be a pretty strong fact, that, whilst these parties were cohabiting together as husband and wife, Augusta Cullington alleged and admitted to Mrs. Scott, that she was the wife of the other party. But this is not the only fact; because Mrs. Scott states that she would not have allowed the parties to reside at her house unless her mind had been satisfied by the production

Circumstances
of marriage.

Not a question whether a marriage took place or not; but as to identity.
Nature of the proof.

JUNE 8.
Cripps v. Cripps.

Sufficient.

Marriage es-
 tablished.

of a copy of the very register produced in the cause. All this evidence goes to establish the identity of the other party. But something more is necessary to satisfy the law. The only additional evidence, however, as to the identity of the party, is that of her handwriting, and if there had been any circumstance which could raise a reasonable doubt that that party was the identical party in the cause, I should consider the evidence insufficient, because it is weak evidence of handwriting alone. But I am not to close my eyes to all the facts stated in the evidence, and although I admit that the proof is not so satisfactory as I could desire; still, taking all the facts together, I am satisfied that the parties were married, and that the identity is sufficiently established. The evidence of Mr. W. H. Cripps, as to the handwriting of Augusta Cullington, is very weak, and the Court regrets that some attempt was not made to obtain clearer proof of the identity of the party. Upon the whole, however, I am satisfied that I shall discharge my duty by holding that the marriage is sufficiently established.

(The Court, not having a shadow of a doubt as to the adultery, pronounced for the separation.)

Proctors:—*F. Dyke* for the husband; *Loveday* for the wife.

Pollard v.
Pollard.
 Nov. 17.

JUDGMENT.

IN POLLARD *v.* POLLARD, on the second session of Michaelmas Term, a similar deficiency of proof occurred. It was a suit for divorce by reason of adultery by the husband against the wife, who did not appear, the proceedings being *in penam*. The adultery, as well as the identity and diversity, was fully proved; but the only direct evidence of marriage was the marriage certificate, the proof of the husband's handwriting, and the evidence of witnesses speaking to comparison of hands, including the husband's sister, who had received letters from the wife, and had no doubt that the signature in the register was hers, but who had never seen her write.

DR. LUSHINGTON.—There is no doubt of the identity and diversity, which are very distinctly and clearly proved; but there is a difficulty about the marriage, and I wish it to be understood that, because in this case I pronounce the marriage sufficiently proved, I do not do so on the ground of evidence of the handwriting of

the wife: I am not satisfied with the testimony of witnesses who never saw her write, though one may have received letters from her. I consider the marriage proved in this way: first, it is distinctly proved that Mr. Pollard, the party proceeding in the cause, is the same party who was married on such a day; secondly, it is proved that, from that day, he continued to cohabit with the very party against whom the suit is promoted, as husband and wife. If there had been the least doubt as to the identity, I would not receive this proof of the marriage; but, looking to the difficulty of proving this marriage, I think it may be inferred from the circumstances. Therefore, I hold the marriage to be proved, but not on the ground of handwriting.

JUNE 8.

Cripps v. Cripps.

Prerogative Court of Canterbury.

JUNE 13.

IN THE GOODS OF MARY PARFITT, SPINSTER.—The deceased died 28th February, 1842. She left a will, executed in the presence of two subscribed witnesses, and, apparently, bore date on the 10th March, 1832. It was very fairly written, but, on the first side, there was an appearance of an erasure, as if the word "thirty" had been altered to "twenty." There was likewise something like an erasure in the date of the year "1832." When application was made for probate, the Registrars, observing the appearance not only of erasures, but of an alteration in the body of the will, declined to pass it.

A will, bearing on the face of it an appearance of erasure and alteration, respecting which the parties are unwilling or unable to make an affidavit, in explanation,—refused probate.

Addams, D.—I am instructed to move for probate of this *MOTION*. paper as it stands. The parties are unwilling or unable to make an affidavit; I therefore move for probate without any affidavit, leaving the Court to dispose of the motion.

SIR H. JENNER FUST.—There is something which bears *DECREET*. the resemblance of an alteration in the date—something that may by possibility be an alteration; but I think it is a mere slur, and that it does not require an affidavit. The paper purports to give to the brothers and sisters of the deceased who were married the sum of "twenty" pounds each, as the will now stands, and after directing the payment of

JUNE 13.
Parfitt, dec.

debts and expenses, the remainder of the property is bequeathed to all the deceased's sisters who are spinsters, to be equally divided between them, and one of the sisters is named sole executrix. The amount of the legacy given to each of the married brothers and sisters has been altered to "twenty;" whether it was originally "thirty," or "forty," or "fifty," it is impossible to discover. Upon the face of the paper, there has evidently been an alteration, and the parties, after waiting till this time, now move the Court to decree probate of the will as it stands; and, through obstinacy or inability, they refuse to make an affidavit. I am of opinion that the probate cannot pass till an affidavit is made, and I reject the motion.

Motion re-
 jected.

Slade, Proctor.

Judicial Committee of the Privy Council.

JUNE 21.

Appeal.—A will made by a person of weak intellect, prepared by an attorney from instructions given by one of the parties, without seeing the deceased, refused probate, — the sentence of the Court below being reversed. — Such proceeding by an attorney dangerous and improper.

WALLIS v. MAUGHAN AND MAUGHAN.—*Appeal.—Definitive Sentence.*—This was an appeal from a sentence of the Exchequer and Prerogative Court of York, where it was a cause of proving in solemn form the last will of William Wallis, late of Anick, in the county of Northumberland, gentleman, who died 15th November, 1838, a widower, leaving John Wallis (since deceased), his brother, only next of kin. The will in question was dated 9th October, 1838, and was propounded by the Rev. Simpson Brown Maughan, and the Rev. William Maughan, clerks, two of the executors (Isabel Maughan, the other executrix, having renounced), against Thomas Wallis, administrator of the late John Wallis, the brother, praying that the deceased might be pronounced to have died intestate. By this will, the deceased purported to bequeath to the five children of Isabel Maughan (including the two executors) £500 each; to Jas. H. Brown, £500, upon the decease of Isabel Maughan; he also devised a copyhold house to Isabel Maughan and her assigns for life, and upon her decease, to Agnes M., her daughter, her heirs and assigns, for ever. The residue of

his real and personal estate he gave to the three executors, in trust for Isabel Maughan, for her own absolute use. This paper was drawn by Mr. John Hughes Preston from instructions received from the Rev. William Maughan, without seeing the deceased (who resided with Mrs. Maughan and her family, at Anick), Mr. Preston handing over the will, when prepared, to Mr. Wm. Maughan, and instructing him as to the number of witnesses to be present at the execution.

Mr. Preston stated, in his deposition, that he knew the deceased very well; that he had no reason whatever to doubt that he was perfectly capable of making a will, or transacting any of the ordinary affairs of life; that the deponent had prepared a will for him, in 1832, from instructions he received from Mrs. Maughan and her son, Simpson Brown M., without seeing the deceased: "I so prepared these wills," he added, "in the full confidence that every thing was regular and proper, having no reason for suspicion; but, on the contrary, from my knowledge of Mrs. Maughan and her family, I placed the most entire reliance on their respectability and integrity." The attesting witnesses de-

posed that they knew the deceased, as well as the family of Mrs. Maughan; and that, at the time of execution, the deceased declared the paper to be his last will and testament, and having asked the deponents if they would be witnesses, signed his name thereto in their presence, he being at such time of sound mind, memory, and understanding. Other witnesses in support of the will deposed to the soundness of mind, and even to the shrewdness and acuteness, of the deceased. On the other hand, a variety of witnesses bore strong testimony to his weakness of intellect, imbecility of mind, and incapacity to make a will; to his being called in the streets "Silly Billy" and "Fond Billy," and to the control exercised over him by the family of the Maughans.

The Court below pronounced in favour of the will, from which sentence the party opposing the same appealed.

Addams, D., and ———, for the Appellant; Sir John Dodson, Q. A., and Teed, for the Respondent.

LORD WYNFORD.—Their Lordships are of opinion that probate of this paper ought not to pass, and that there should be judgment for the Appellant. They are further of

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Wallis v. Maughan.

Drawn from instructions given by one of the parties, without seeing the deceased;

in full confidence that every thing was regular.

Evidence in support of the will.

To the contrary.

1841.
Jan. 14.

JUDGMENT.
For the Appellant.

JUNE 21.

*Wallis v.
Maughan.*

opinion that the costs ought not to be paid out of the estate, but that each party should pay their own costs, both in the Court below and in this Court. It would be impossible, at this time, to state at length the grounds of this decision, by going through all the circumstances of the case; but their Lordships are anxious that one observation should be

A dangerous proceeding for an attorney to take instructions from one of the parties without communication with the testator;

particularly improper in this case.

made, and that is, that it is a most dangerous proceeding for an attorney to take instructions from one of the parties without any communication with the testator himself: it is impossible for the Court to be satisfied in this case whether the deceased knew any thing of the will. Their Lordships think that, in the weak condition of the testator, it was most improper for the attorney to take instructions for a will from one of the parties (not, it is true, the party principally interested), not being himself present at the time of execution, and it being impossible for him to know whether there had been any communication whatever on the subject of the will with the party making it. Their Lordships do not think it right that an attorney should take instructions from parties interested in any case: but it is particularly improper in the case of a person of weak intellect, as the supposed testator was in this case.*

Proctors:—In the Court below, *Hudson* for the executors; *Lawton* for the administrator and next of kin: In this Court, *Blake* for the Appellant; *Buckton* for the Respondents.

Prerogative Court of Canterbury.

JUNE 23.

Attestation.

—Of the attesting witnesses to a will, one swore, directly and positively, that the testator signed in the presence of both; the other, directly and positively, that he

GOVE v. GAWEN AND OTHERS.—*Cause.*—The testator, Henry Prescott, of Greenwich, Kent, a pilot, died on the 14th July, 1839, aged 60, possessed of personal property amounting to about £6,000. He was a widower, and had but one child, Elizabeth Prescott, spinster, who had since his death married Mr. Alexander Gove. In June, 1839, the

* The Committee consisted of the Lord President (Lord Wharcliffe), Lord Wynford, Lord Brougham, and Dr. Lushington.

testator, being ill and confined to his bed, sent for Mr. Richard Cattarns, his solicitor, and informed him he wished to make his will; Mr. Cattarns accordingly wrote down heads or memoranda of his verbal instructions, which he afterwards extended, and two days after, read over to the testator, who said they were quite correct, and assigned reasons for certain of the bequests. Mr. Cattarns prepared from these instructions a will, which he caused to be engrossed for execution. On the 5th or 6th July, he took the will to the testator's house, but was informed that he was dosing, and consequently waited another opportunity. On the 7th July, the testator sent for him, and Mr. Cattarns took the engrossed will to the testator's house about noon. Upon going into his bed-room, where he was in bed, the testator begged his sister (Jane Prescott), who was with him, to withdraw, and Mr. Cattarns sat down by the bedside, and read the contents of the will to the testator. When the reading was ended, Mr. Cattarns said they would want a light to seal with, and another witness; upon which the testator called to his sister, who was in an adjoining room, and desired her to fetch a light, which she did, and Mr. Cattarns told her that a second witness was wanted. Whilst she was gone for a witness, Mr. Cattarns affixed a seal to the will, and on her return with Sir George Sans Stanley, a pilot, an old acquaintance of the testator, according to the deposition of Mr. Cattarns, he gave the will to the testator, and, in the presence and hearing of Stanley, dictated to him, the testator deliberately repeating, the words, "This is my will; it is as I wish it, and I wish you to witness it." The will then being placed before the testator, who was in bed, he, in the presence of both witnesses, signed his name at the foot of each sheet, and, by direction of Mr. Cattarns, touched the seal with his finger, declaring such to be his act and deed. Mr. Cattarns and Stanley then signed their names as attesting witnesses, placing their initials also to certain alterations. Mr. Cattarns further deposed that he and Stanley were present the whole time, and that the testator was of perfect capacity, though in a state of bodily debility. On Interroga-

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Gove v. Goven.

did not and could not have signed in his presence,—the attestation-clause purporting that the will was signed, sealed, published, and declared in the presence of both the witnesses:—Held, that most credit was due to the former, who had deposed to the fact within a few days after the transaction; whereas the other was not examined till two years after.

Evidence.

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Gove v. Gaven.

tory, this witness stated that the testator was lying on his back, with his head and shoulders slightly elevated by pillows; that Stanley was in the room when the testator signed the will four times, and repeated the words of publication, but not when the will was read over; that the room was a small one, and if there were curtains to the bed, they were drawn back; that he (witness) did not say to Stanley, upon his entering the room, "I suppose you don't want to read the will—I have read it to Mr. Prescott;" that it is impossible he can be inaccurate or mistaken in respect to Stanley's being in the room when the testator signed the will, and in July, 1839, he made an affidavit (on account of the corrections) of the joint presence of Stanley and himself at the execution of the will. The second witness, Stanley, deposed that, upon his entering the testator's bed-room, Mr. Cattarns said to him, "Have you any objection to sign Mr. Prescott's will?" to which the witness replied, "No;" that Mr. Cattarns then said, "I suppose you don't wish to hear it read—I have read it to Mr. Prescott," to which the witness replied, "If Mr. Prescott is satisfied, I am;" that, at this time, the will was lying on a small table in the room; that Mr. Cattarns then asked the witness to sign the will, and he did so four times; that he had not at such time seen the deceased sign the will, but, at the time of signing, he is sure that he saw Mr. Prescott's handwriting to the will—he saw his name written close to the place where he (witness) signed; that the will had not, whilst he was in the room, been in the hands of the testator before he (witness) signed it; that the deceased did not, in the joint presence of witness and Mr. Cattarns, declare the paper to be his will; that, when Mr. Cattarns went away, the testator said to witness, "This, George, can't prolong my days, nor shorten them—I have left my shipping interest between my two girls, to be shared equally—I have left it in the hands of Terry—he is an honest fellow." This witness also deposed to the perfect capacity of the testator. On Interrogatory, he deposed that the position of the table, on which the will was lying when he entered the room, was between the window and the foot of the bed, at the right hand of the deceased, who, at no time while he (witness)

was in the room, was raised up in bed, nor was his attitude or position altered, nor had he at any time a pen in his hand, nor did he name the word "will;" the witness never lost sight of him whilst he remained in the room, and he must have seen him sign a paper if he had so done; the witness was not more than (if as much as) a minute in the room before Mr. Cattarns asked him to sign the will, and it was quite impossible that the deceased could have signed his name to four sheets without being seen to do it by the witness, who, except when he signed his own name to the will at the table, never took his eyes off the deceased from the time he entered the room till after Mr. Cattarns had left it.

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Gove v. Gawen.

The attestation-clause of the will purports that it was "signed, sealed, published, and declared by the testator, as and for his last will and testament," in the presence of the witnesses. The will appoints James Gawen, James Gawen jun., and James Terry, executors, who proved the will in 1839. In the beginning of 1842, a decree was extracted at the promotion of Mrs. Elizabeth Gove, wife of Alexander Gove (formerly Elizabeth Prescott), citing the executors to bring in the probate and shew cause why the same should not be declared null and void, and administration of the deceased's effects, as intestate, granted to Mrs. Gove, his natural and lawful daughter. On behalf of the executors, an Allegation was brought in and admitted without opposition, and two witnesses were examined upon it, Cattarns and Stanley, the latter by compulsory.

Jenner, D., for the executors.—No fraud or incapacity is

set up in opposition to the will. Mr. Cattarns, a respectable solicitor, of eleven years' standing, who, in 1839, must have known what the requisites of law were, speaks positively to an act done before his own eyes, which he deposed to shortly after the testator's death. The attestation-clause purports that it was signed, published, and declared by the testator as and for his will, in the presence of the subscribed witnesses; Stanley, therefore, is deposing against his own act. His evidence is merely negative, that he did not see the testator sign; but if he was present in the room, that is

Evidence
against the
will, negative
merely.

JUNE 23. sufficient. *Chambers v. Yatman* ;* *Stobart v. Dryden*.†
Goss v. Goss. [PER CURIAM.—He swears it is impossible that the deceased could have signed the paper in his presence without his seeing him.] Look at the time when he so deposes, in April, 1842. The probate has been in the possession of the executors and acquiesced in for more than two years.

Addams, D., for the daughter and sole next of kin.—The question is, whether the will has been executed in conformity with the Statute. On whom does the *onus probandi* rest? On the party setting up the will. Many wills have been refused probate under the Statute, whereby the intentions of parties deceased have been defeated. There is nothing to induce the Court to believe that Stanley is mistaken, or prepared to give false evidence. In the condition of the deceased, it must have been an operose affair, occupying some time, to sign his name in four places; yet Stanley says he was not more than a minute in the room before he was asked to witness the will. My belief is, that Mr. Cattarns incautiously allowed the deceased to sign the will before the other witness arrived, and intended that he should acknowledge his signature in the presence of both witnesses.

Deane, D., on the same side.—Mr. Cattarns deposes under the impression that his professional character is at stake. Where two witnesses depose differently, the Court must give credit to the one who has the least bias; and Stanley can have none.

JUDGMENT. SIR H. JENNER FUST.—This would be a difficult question to deal with if it were necessary to decide whether one of these two witnesses deposed corruptly. Mr. Cattarns deposed to the fact before the executors were sworn to the due execution of the will, on the 30th July, 1839, whereas the witness Stanley was not examined till April, 1842, two years and a half after the occurrence, and therefore very possibly he may have forgotten the circumstances, and may have had an impression made upon his mind by representations of the hardship of the will towards the daughter of the deceased. It is not, therefore, absolutely necessary for

The witness Stanley may have forgotten the facts.

* 2 Curt. 415.

† 1 Mee. and W. 615.

the Court to conclude that he is perjured if he states the facts differently from what actually took place. It is said that Mr. Cattarns feels that his professional character is at stake, and deposes under a strong bias to support his own account of the transaction. But that observation would apply to a solicitor in every case, for no solicitor can come forward to depose to a transaction without feeling that his professional character is at stake. But because his professional character is at stake, am I to presume that he has invented the statement, and that, within a few days after the transaction, he would come forward and state a falsehood? for his affidavit of the 29th July, 1839, contains a direct averment, that the testator executed his will, "by signing his name at the foot or end thereof, in the presence of the deponent and of George Stanley, the other subscribed witness thereto." He cannot have forgotten the fact in that short space of time, and I cannot presume that it was a corrupt invention; the question, therefore, is not between two witnesses, one or the other of whom must have deposed falsely; but between one witness who could not have forgotten the facts, and another witness who was not examined till two years and a half after the transaction, and who may have forgotten them. But independent of this, I have the evidence of the attestation-clause, which purports that the will was "signed, sealed, published, and declared," in the presence of both the witnesses; I have, therefore, Stanley's act against his deposition. In another case, I should not place any reliance upon this circumstance; but where two witnesses depose against each other, I must look at all the circumstances; and if I look to those under which the execution took place, as described in the evidence, I have no doubt to which of the witnesses I am bound to give credit. There is nothing to shew when Stanley first took up the notion that the will was not signed in his presence; but very serious considerations attach to this question, if the rights of parties are to depend upon the deposition of a single witness given after so long a period. It is incumbent upon parties to come forward at the earliest period, and it would be a serious evil if a witness, at the end of two, three, or five

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Gosse v. Gawes.

Mr. Cattarns swore directly to the fact in 1839.

The question, therefore, a balance of recollection.

The attestation-clause supports Cattarns.

Question seriously affects rights of parties.

JUNE 23. years, could come forward and swear that a will was not executed in his presence, and the probate was thereupon to be called in. Here is a *prima facie* execution in the presence of two witnesses, and an attestation-clause purporting that it was so executed. I have nothing to do with the contents of the will—that is not the question, and there is no doubt as to the mental capacity of the deceased; it is a dry question of fact. It is not necessary that the witness Stanley should have deposed corruptly because he swears that the will was not signed in his presence, since, in two years and a half, he may have forgotten the circumstance; whereas Mr. Cattarns, within a few days after the execution of the will, positively swore that it was signed in the presence of both the witnesses.

Credit due to Mr. Cattarns. Under these circumstances, I am bound to give credit to Mr. Cattarns (on whose character there is no imputation whatever); I confirm the probate, and direct it to be delivered out. I do not give costs.

Probate confirmed.
Without costs.

Proctors:—*Nicholson* for Mrs. Gove; *Pulley* for the executors.

Arch^{es} Court of Canterbury.

JUNE 27.

Articles against a clergyman for brawling, sustained. — In such a case, the Court is not empowered to require a certificate of good behaviour during suspension.

THE OFFICE OF THE JUDGE PROMOTED BY BURDER *v.* LANGLEY.—*Cause*.—This was a proceeding by Letters of Request from the Bishop of Oxford, under the Stat. 3 and 4 Vict. c. 86, at the voluntary promotion of Mr. John Burder, against the Rev. William Hawkes Langley, M.A., perpetual curate of Wheatley, in the county and diocese of Oxford, for quarrelling, chiding, and brawling by words, in the parish church of Wheatley. The Articles pleaded as follows:—

Articles.

1. The Stat. 5 and 6 Edw. 6, c. 4, and the laws, statutes, canons, and constitutions of the church. 2 and 3. That the defendant was a clerk in holy orders of the Church of England. 4. That on Sunday, the 9th May, 1841, whilst he was in the performance of divine offices in the church of the perpetual curacy,

shortly before the conclusion of the Litany, after the response immediately following the prayer beginning "Oh God, merciful Father," he made a short pause, and instead of proceeding with the service, being wholly regardless of the sacredness of the place and of his own duty in the performance of the divine office, he, in a chiding, quarrelsome, and brawling manner, addressing the congregation then and there present, said, "You were, perhaps, surprised at the pause I made at the end of the prayer, but it reminded me of my enemies. I have this morning received a letter from the archdeacon, offering some clergyman to do my duty for me: some one in the congregation has had the audacity to write to the archdeacon on the subject. Who has had the audacity to do this? Is it a Puseyite, who wants to introduce Popery into the parish? I will, however, take care they never shall, as I will do my duty myself. I have preached the Gospel, and delivered my own soul, whether the people will hear, or whether they will forbear. Some one has committed perjury against me in an affidavit made before Mr. Ashurst; but he waited till the witnesses were dead, so that he could not be punished for his perjury. Another of my enemies has written a letter to the bishop, full of falsehoods, to take my poor old uncle's living away; one of them has been to a dear old friend of mine, the only dear friend I have at Oxford, driving falsehoods into his ears, in order to set him against me. I have been charged with adultery; but the fact is, that, one night, as I was coming from my tenant's at Lobb Farm, I saw a drunken man ill-treating his wife, and I interfered for her protection; for my being a clergyman did not prevent my acting with humanity towards a female under such circumstances. The man told me I might be damned; what was it to me? what had I to do with it? He then struck me; but the Lord gave me power, and I knocked the man down," at the same time using the action of striking with his fist, in illustration of the manner in which he struck the said man; that he then proceeded to say, "If any man can prove me an adulterer, I will have my head cut off and forfeit it, and I have before mentioned this circumstance to the bishop;" adding, "I pray for my enemies, and forgive them, and hope they will repent;" that during the delivery of this address, he was in a very excited and impassioned state, and frequently struck the reading-desk and the books thereon, in a very violent manner, with his clenched fist, and by such improper and incorrect conduct, gave great offence to the congregation then assembled in the church, and reflected scandal and disgrace on his sacred profession. 5. That the defendant

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*Burder v.
Langley.*

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proceeded with the service until after the response immediately succeeding the Ninth Commandment, when, instead of proceeding with the Tenth, he, in a chiding, quarrelsome, and brawling manner, addressed the congregation, and after adverting to that part of his former address relating to the persons therein stated to have given information to the archdeacon, proceeded to say, "One of my enemies in the parish has had four bastards, all the children of one man by one woman; the bastards are dead, the woman is dead; all dead, dead; gone, gone out of the way;" that he then adverted to her Majesty's Ministers, and the proposed alterations in the corn laws, and declared that the Ministers deserved praise for enabling every one to worship God according to their own conscience, and for wishing to give to every man a cheap loaf; that all who had votes would soon be called upon to give them, and urged them to give them in favour of the then Ministers, and added, "God bless the present Government; I have been attacked on account of being engaged in their service; I forgive my enemies, and hope they will repent;" that by such his irreverent and improper conduct, he gave great offence to the congregation, and reflected scandal and disgrace upon his sacred profession. 6. That for such offence the defendant ought to be canonically and duly corrected and punished. 7. Pledged the Act 3 and 4 Vict. c. 86.

These Articles were admitted, though opposed by the defendant in person.

The defendant, having given a negative issue to the Articles, brought in a responsive Allegation to the following effect:

Responsive
Allegation.

It began by denying that the Stat. 5 and 6 Edw. 6, c. 4, applied to his case, inasmuch as he, on the occasion in question, merely supplicated the prayers of his congregation in his behalf, on the ground of the slanders, frauds, and acts of violence he had suffered, and pleaded that he did not quarrel, chide, or brawl, or conduct himself in anywise irreverently, or otherwise than the circumstances he was placed in imperatively demanded; that the structure and import of the words he used, and the general character and description of the address on the occasion, were wilfully and maliciously garbled, distorted, interpolated, and misrepresented, which was manifest, and could be proved by credible testimony, as well in respect of the several propositions contained in the articles, as in regard of the malicious omission of any intimation that the address was avowedly and essentially a supplication

for the prayers of the congregation ; that no offence whatever was given to the congregation, but, on the contrary, a strong and truly Christian sympathy was felt and afterwards expressed by the great majority of persons assembled for his situation and treatment, and especially that the words "some one in the congregation has had the audacity" were a false and malicious interpolation of the address ; that the practice of soliciting the prayers of a congregation, with a brief and general description of the grounds thereof, is very prevalent, well authorized, and does not subject the clergyman using it to canonical censure, whether these prayers be requested for himself or others, members of his congregation or not, as, for example, in the case of the sufferers in the Niger Expedition ; that the instructions for the Articles were furnished by persons of bad character, and inveterately hostile to Mr. Langley, and that corruption and subornation had been employed in procuring evidence to support them. The Allegation then went on to impugn the conduct and character of individuals, and the forms of proceeding in this Court, alleging that the whole was calculated to frustrate the ends of justice.

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—
Burder v.
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After hearing *Phillimore, D.*, and *R. Phillimore, D.*, in Jan. 29.
 opposition to this Allegation, and the defendant in support of it,

SIR H. JENNER FUST was of opinion that, had the Alle- JUDGMENT.
 gation set forth the words actually used by the defendant, that part of it might have been admissible ; but that, in its present shape, it was altogether in form and substance inadmissible ; that great part was irrelevant by way of defence, and some portion impertinent and scandalous, and he re- Allegation
 jected the Allegation. rejected.

The defendant desired to appeal from this decision to her Majesty in Council, but

The COURT, having a discretion under the Statute to Appealrefused.
 permit an appeal in this stage, was of opinion that this was a case in which an appeal should not be allowed, and being pressed by the defendant to state the reason, said, "The irrelevancy of the grounds of your defence."

Witnesses were examined on the Articles, and interrogated by the defendant. Publication of the evidence having passed, the defendant brought in an Allegation exceptive to the credit of four of the witnesses. This Allegation Exceptive
 having been debated, Allegation.

- JUNE 27.** The COURT considered it altogether and in every part inadmissible; that it was irrelevant and impertinent, and that it contained matter of scandal imputed to the witnesses which the Court had no opportunity of inquiring into; and rejected the Allegation, concluding the cause, and assigning it for information and sentence on the first session of the then ensuing Term.
- Burder v. Langley.*
- MARCH 15.** Accordingly, on that day, the argument commenced, and (being suspended, owing to the illness of the Judge) was resumed in Trinity Term, lasting several days, the defendant speaking for nearly sixteen hours.
- APRIL 15.** *Phillimore, D., and R. Phillimore, D.,* for the Promoter, submitted that the Articles were fully proved, and that the Court was called upon to accompany its sentence of suspension for a long period, with the requisition of a certificate of good behaviour previous to the defendant's restoration to the functions and profits of his benefice, or that there should be no remission of the sentence till contrition was expressed. [Authorities cited:—*Cox v. Goodday*;* *Dicks v. Haddesford*;† *Watson v. Thorp*;‡ *Saunders v. Davies*;§ *Ayliffe*;|| *Lyndwood*.¶]
- JUNE 1. REPLY.** SIR H. JENNER FUST (addressing the defendant, who stood up in Court), after stating the form of the proceedings—this being the first case since the passing of the Statute—the nature of the charge, and the extent to which the evidence had fallen short of the plea, thus proceeded:—It is quite impossible for any person who has heard the Articles read to doubt that they allege a most grave and serious offence against that order and decorum which ought to be particularly observed in such a place and at such a time.
- JUNE 27. JUDGMENT.** The language and the demeanour of the person using it are grossly irreverent, and I say the words are indecorous and calculated to “produce surprise and discomposure in the congregation; endanger the engaging the minister himself in scenes of altercation and contention, that may derogate from the proper dignity of his functions, and produce un-
- Character of the offence charged.
- * 2 Hagg. C. R. 138. † 1 Add. 298. ‡ 1 Phill. 277.
§ 1 Add. 291. || *Parery*. 501.
¶ *Const. Prov.*, ii. 56.

hallowed consequences very inconsistent with the purposes for which himself and the assembly were collected together."* If the language alleged in the Articles is proved to have been used, can there be any doubt that it was calculated to produce these consequences? And if so, it comes within the strict legal definition of quarrelling, chiding, and brawling, and justly subjects the party to the penalties of the Statute passed in aid of the ecclesiastical law; for the offence (as stated by Lord Stowell) was not created by the Statute; it existed long before, by the ecclesiastical law, and a party may now proceed (as Lord Stowell says), either upon the Statute, or upon the ancient law; for "wherever a Statute leaves an offence as it found it, and only introduces additional punishment, a party may proceed on either."

Hutchins v. Denziloe.† This Statute is not absolutely necessary to found the jurisdiction of the Ecclesiastical Court, which has undoubtedly a right to punish offences in disturbance of public worship: "there must be some jurisdiction in reason and principle to effect this, and it properly belongs to the Ecclesiastical Court."‡ So that the Statute was passed to aid and support the ecclesiastical law in repressing any proceeding calculated to violate the sanctity of churches, and all acts tending to interrupt divine worship, by preventing any thing from being said or published during divine service in the church, even by the minister himself, unless authorized by the Book of Common Prayer, or by the Arch-deacon or the Ordinary.

On the evidence of the witnesses, the Court has no doubt whatever that the offence is proved to the fullest extent, and that it is an offence which loudly calls for the interposition of the law to repress such occurrences, and as a necessary example to other persons, if there be any, who shall take up such an erroneous impression as Mr. Langley has done, after being sixteen years the minister of this parish; namely, that it is perfectly proper (without reference to the general terms of the address) to make an address to his con-

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Langley.*

Proceeding
may be under
Stat., or the
ancient law.

The offence
fully proved.

* Per Lord Stowell, in *Cox v. Goodday*.

† 1 Hagg. C. R. 181.

‡ *Cox v. Goodday*.

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Langley.*

The defence.

gregation for their prayers to protect him against a repetition of attacks to which, he states, he has been subject.

Now what does the defence amount to? Why there is a general charge of a combination and conspiracy on the part of some of the parishioners against him, and at the head of this conspiracy is the bishop of the diocese, as if the proper interference of the bishop was to be imputed to personal hostility. Mr. Langley includes with those of his own parishioners whom he supposes to be engaged in a conspiracy against him, to deprive him of his incumbency, some highly respectable persons, who are as much aloof from a purpose of this kind as any individuals that could be named: they have nothing to do with the matter, or with the charge against Mr. Langley, who is the conspirator against himself, in having suffered himself to be excited, and in having exposed himself, in the manner he is proved to have done.

State of the parish.

The parish appears to have been the scene of disputes for a number of years past, whilst Mr. Langley has been the curate, between him and his parishioners. I do not impute this to Mr. Langley's absence from the parish; but I cannot help saying that, if he had been in a situation to discharge his duty in the week time there, instead of going to Wheatley on the Sunday and leaving it on the Monday, the condition of the parish might have been different. I do not impute this to Mr. Langley as an offence; it is his misfortune.

Whether the charge admits of extenuation.

The only question I have now to consider is, whether the charge proved admits of any extenuation. Mr. Langley might have urged sudden passion or provocation—that would have been no excuse, but it might have been an extenuation of the act, and I should not have considered that he had been guilty of a deliberate offence, which called for a full measure of punishment; because what is done through a sudden ebullition of temper has not the guilt of premeditation.

The act a deliberate one.

But this was a deliberate act; Mr. Langley says, the supposed persecution has been going on for several years, and the letter to the archdeacon, which may have been written, for substituting another clergyman to perform his duty, had produced in Mr. Langley's mind a determination

to pursue the line of conduct which he adopted, and he accordingly did call the attention of the congregation to a particular person, then in his view ; for it is clear who was the individual in his view, who had no power to explain or to defend himself.

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Mr. Langley has attempted to justify himself on the ground that what he did was "asking the prayers of the congregation." That he did ask the prayers of the congregation, some of the witnesses admit. But how? At the conclusion of an excited and improper address, unsuited to the place or the occasion. Instead of expressing contrition, he seems to glory in the act, and contends that he has a right to repeat it. But he should consider, if he has no regard for his own character, the character of the place, and not make an individual the subject of remark, in the face of the parish, where he could not justify himself without being guilty of an offence. As Lord Stowell has said, "The church is not the place where private quarrels are to be carried on, and it is no justification that there was misconduct on the other side, which might give the first provocation—the church not being a place where human infirmity can be pleaded to justify violent and indecent conduct, however produced." And when Mr. Langley urges that, in *Cox v. Goodday*, Lord Stowell said that a case might arise which would justify the officiating minister in addressing a congregation, "as far as was necessary to remove an obstruction to the public service," this is not such a case, namely, where, during the performance of divine service, something calls for immediate interference, to prevent indecent conduct in the church. Mr. Langley is, therefore, without any excuse of sudden provocation, and the asking for the prayers of the congregation, after the address had been brought to a conclusion, was a mere pretence.

Plea that the act was asking the prayers of the congregation.

Then it is objected that these proceedings have been instituted by the secretary of the Bishop. I suppose they have been instituted by the Bishop's directions, and it is better that the Bishop should not be himself the Promoter of the Judge's office ; indeed, I am not aware that, under the Act, the Bishop could be the Promoter. The Bishop is loaded

Objection that the proceedings instituted by the Bishop's secretary,

unfounded.

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aggravation.Charge fully
proved.One of the
worst cases.The punish-
ment.The Stat. as-
signs suspen-
sion.

with obloquy by Mr. Langley on account of his taking part in these proceedings. I can only say that, if the Bishop had passed over Mr. Langley's conduct, he would not have properly discharged the duties of his high office. It is his duty to prevent any irreverent conduct by a minister during the performance of divine service, and more particularly by one who is under his immediate notice. I cannot but look at Mr. Langley's defence as a very great aggravation of the grave and serious offence of which he is guilty, and I cannot help observing that the extraordinary course he has adopted, of bringing forward accusations against others, is not only a great aggravation of his offence, but a melancholy exhibition of himself, notwithstanding the caution which the Court gave him, in a spirit of kindness.

I am clearly of opinion, on a full consideration of the evidence, that the charge is abundantly proved, and the offence clearly and indisputably substantiated against Mr. Langley. There is only one other consideration—that is, what punishment is called for by the law for what has been properly described by the learned Counsel as one of the worst cases of chiding and brawling which have ever come to the notice of the Court.

The proceedings have been instituted under the 5 and 6 Edw. 6, and not under the general ecclesiastical law, and the punishment which the Court is prayed to inflict is that of suspension. What was the punishment assigned to the offence in former times by the general ecclesiastical law, it is not very easy to ascertain. In *Hutchins v. Densiloe*, Lord Stowell says that, by the ancient ecclesiastical law, for such an offence, the benefice of an offending minister might be sequestered—whether for one offence, or for a repetition of the offence, is not stated; I cannot find that there was a sequestration of the living for one offence. I am, therefore, called to assign a punishment under the Statute,

whereby the punishment in such a case of a clerk in Holy Orders is suspension from the ministration of his office “for so long a time as the Ordinary shall think fit, according to the fault.” The amount of punishment is thus left to the discretion of the Court, and I am of opinion that, in this

case, the Court is bound to pronounce a sentence that shall carry with it the effect of shewing its sense of the seriousness and gravity of the offence, and the Court is of opinion that it will not exceed a due measure of justice if it pronounces that Mr. Langley has committed an offence which calls for the punishment of suspension from his office for a period of eight calendar months from the time when such suspension shall be published and notified in the parish of Wheatley.

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*Burder v.
Langley.*Sentence of
suspension for
eight months.

The Court has been pressed not to allow the suspension to be removed till Mr. Langley shall produce a certificate of good behaviour during the period of suspension. But I have not been able to find any precedent for requiring a certificate of good behaviour in a proceeding of this description.

Certificate of
good behaviour.

In a proceeding for drunkenness, where the party, a minister in Holy Orders, with a benefice, has been suspended, a certificate has been required,* as a proof of the conduct of the party: but *Dicks v. Haddesford* was the first instance of a certificate being required even in such a case, and I consider that it would be extremely difficult to draw up a certificate with reference to the offence of chiding and brawling, embodying within itself the requisite qualifications to enable Mr. Langley to shew in what manner he had conducted himself in this particular. I can understand that, in cases of immorality and habitual drunkenness, a certificate may be proper, to shew that the party has abstained from such conduct; but in a case of chiding and brawling, I do not see how a certificate could be framed so as to shew that the party had not committed the same offence. And, independently of this, the punishment in this case is prescribed by the Statute, and I do not know that the Court is at liberty to add to it by requiring a certificate of good behaviour during the time of suspension. I should have great doubt and difficulty in saying that the Court has the power to require such a certificate, and as there is no precedent for it, I confine the sentence to what the law prescribes, and I direct the suspension to be signified on Sunday next, the 3rd of July. I further am bound to condemn Mr. Langley in the costs occasioned by these proceedings.

Not suited to
cases of brawling;
ing;nor required by
the Stat.Defendant
condemned in
costs.

- * See *Burder v. Spear*, ante, p. 63.

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Langley.*

ings, and I am afraid they will fall heavily upon him; but the Court has no means of relieving him from them. I endeavoured, as far as I could, to acquaint Mr. Langley with the nature of the offence charged against him, and to convince him of the propriety, if he was guilty (as it has turned out he was), of admitting the charge, and not rendering it necessary that the Articles should go to proof; but Mr. Langley saw fit to take another course, and has brought this expense upon himself by the manner in which he has (I will not say defended himself, but) conducted his own cause, whereby the Promoter must have incurred considerable expense. If Mr. Langley, after the intimation from the Court, had, on the admission of the Articles, given an affirmative issue, the expense would have been slight, and the suspension much less than must now be imposed for the sake of example, for the conduct pursued by Mr. Langley has induced the Court to make the suspension continue for a longer period.

I pronounce that Mr. Langley has incurred suspension for eight calendar months from the day (including the day) when the sentence is notified; I monish him to abstain from such conduct in future, and I condemn him in the costs.

Monished to
abstain in fu-
ture.

Jenner, Proctor for the Promoter.

Judicial Committee of the Privy Council.

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Appeal.—Ar-
ticles against a
clergyman for
refusing to bury
the corpse of
an infant bap-
tized by a Wes-
leyan minister,
—sustained.—
Sentence of the
Court below af-

ESCOTT v. MASTIN.—*Appeal.—Definitive Sentence.*—This was an appeal from the Arches Court of Canterbury,* in a cause of office promoted by an inhabitant of the parish of Gedney, Lincolnshire, against the Rev. Thomas Sweet Escott, vicar of that parish, for refusing to bury the corpse of the infant daughter of a parishioner, on the ground that, as the deceased had been baptized by a Wesleyan minister, who was unordained, the rite or form of baptism performed by

* 2 Curt. 692.

him was to all intents and purposes null and void, and in the Rubric of the Book of Common Prayer, in the order for the Burial of the Dead, it is enjoined that such office is not to be used for any that die "unbaptized," which was the alleged condition of the infant to whom burial had been refused. The Judge in the Court below held the offence to be established, and sentenced the defendant to be suspended for three calendar months, condemning him in the costs. From this sentence Mr. Escott appealed.

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Escott v. Mastin.

firmed.—What is essential to the validity of lay baptism.

The case was argued by *Phillimore*, D., and *Harding*, D., for the Appellant; *Sir John Dodson*, Q. A., and *F. Kelly*, Q. C., for the Respondent.

LORD BROUGHAM.—An objection was, in opening this case, taken, and for the first time taken here, to three of the witnesses—*Balley*, *Bond*, and *Overton*—who, it was contended, were rendered incompetent by the 12th Canon, which ordains that "Whosoever shall hereafter affirm, that it is lawful for any sort of ministers and lay persons, or of either of them, to join together and make rules, orders, or constitutions, in causes ecclesiastical, without the king's authority, and shall submit themselves to be ruled and governed by them, let them be excommunicated *ipso facto*, and not be restored until they repent, and publicly revoke those their wicked and anabaptistical errors." This objection ought clearly to have been made in the Court below; however, it is unavailing whensoever made. First, it would not dispose of the cause if it were allowed; and next, it is unfounded and cannot be allowed.

JUDGMENT.

Objection to certain witnesses.

Unavailing,

That it would leave the case unaffected if allowed, is plain both from the pleadings and the evidence; from the pleadings, because the first article of the Responsive Allegation admits the Appellant's refusal to read the burial service, and the third article, referring to the Promovent's Allegation, that the child had been baptized by a Wesleyan minister, alleges such baptism to be null and void, while the tenth alleges its invalidity on a similar ground, and the seventh pleads the Rubric forbidding the Office for the Dead to be used for any that are unbaptized; so that, the refusal to read the service being admitted, the ground of that refusal is

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pleaded—namely, that if the child had, as is alleged by the Promovent, been baptized at all, it was by a person unauthorized, and that, therefore, there was no valid baptism; and thus the only material facts of the case are admitted by the pleadings, and the whole question is raised on the pleadings, without any evidence being required.

and without
foundation.

But, suppose the objection to prevail, it can only affect the three witnesses who have been named—Balley, Bond, and Overton—and has no application to Thomas and Sarah Cliff, who prove the whole case on the Promovent's part. We are, however, of opinion that the objection has no foundation. No one of the three witnesses is asked any questions, his answers to which could bring him within the description of the 12th Canon; no one of them admits that he is a person who affirms the competency of any minister or layman without royal authority to make orders or constitutions in ecclesiastical causes, and that he submits himself to be governed by such orders. All they say is, that the Wesleyans, as a body, do so; and that they, the witnesses, are Wesleyans. Suppose (what is not admitted, however) that the so affirming and so submitting would operate as excommunication without sentence, such effect could only follow from the individuals, as individuals, doing that which incurred this penalty. It becomes, from these considerations, unnecessary to inquire how far the dictum of the learned Judge, in *Grant v. Grant*,* bears out the position contended for. But it is fit that we add our opinion, that the words in Lyndwood (p. 276), "*incurrit sententiam excommunicationis ipso facto*," compared with those of the Canon and the Statute 5 and 6 Edw. 6, would make it very difficult to maintain this position; while the Toleration Act,† and still more the 53 Geo. 3, c. 127, passed long after the date of *Grant v. Grant*, appear to leave no doubt that the incapacity, if it ever existed, is now removed.

Objection to
the Promovent,
untenable.

The objection taken below to the competency of the party Promovent, on similar grounds, seems wholly untenable. Indeed, the Appellant's Counsel did not rely much on it here, feeling, probably, that the authority of the decision in *Grant*

* 1 Lee, 593.

† 1 Will. and M. c. 18.

v. *Grant* was not to be got over. In that case, the point was expressly raised and determined; nor does the decision appear to have been called in question since. The learned Counsel, therefore, relied rather on the objection to the witnesses, as one which it was supposed that the *obiter dictum* in that case in some sort countenanced.

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The ground is thus cleared for examining the main question between the parties; and this resolves itself into the construction of the Rubric to the Burial Service. The 68th Canon is clear and distinct, attaching the penalty of suspension to a refusal of that office in any case except one, that of a person having been “denounced excommunicate *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance.” But the Act of Uniformity* having incorporated, as part of its provisions, the Office for the Burial of the Dead, and the Rubric for that office forbidding the use of it for “any that die unbaptized,” it will be a sufficient defence to the charge, under the 68th Canon, if the child died unbaptized. The whole question, therefore, is reduced to this: does baptism, by a person not in Holy Orders, possess the character of that sacrament according to the laws of the Church; in other words, can any one, other than a person episcopally ordained, baptize so that the ceremony may be effectual as baptismal, though the performing it may be irregular and even censurable? Is the solemnity performed by a layman, sprinkling with water, in the name of the Trinity, valid as baptism in the view of the Church, although the Church may greatly disapprove of such lay interference without necessity, as she disapproves even of an ordained person performing the ceremony in a private house without necessity, and yet never scruples to recognize the rite so performed as valid and effectual? Nothing turns upon any suggestion of heresy or schism; the alleged disqualification is the want of Holy Orders in the person administering the solemnity, and it is as unqualified, and not as heretical and schismatical—heretic without or schismatic within the pale of the Church—that any one’s competency to administer it is denied.

Main question, — construction of the Rubric to the Burial Service, and

validity of lay baptism.

* 13 and 14 Car. 2, c. 4.

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Escott v. Martin.
 The law in
 1603.

The 68th Canon being that upon which this proceeding is grounded, it is necessary to consider what the law was at the date of the Canon, the year 1603. Without distinctly ascertaining this, we cannot satisfactorily determine what change the Rubric of 1661, adopted into the 13 and 14 Car. 2, c. 4, made, and in what state it left the law on this head; because it is very possible that the same enactment of a Statute, or the same direction in a Rubric, bearing one meaning, may receive one construction when it deals for the first time with a given subject-matter, and have another meaning and construction when it deals with a matter that has already been made the subject of enactment or direction; and this is most specially the case where the posterior enactment or direction deals with the matter, without making any reference to the prior enactment or direction. Still more is it necessary to note the original state of the law, when it is the common law that comes in question, as well as the Statute.

The Book of Common Prayer was adopted and prescribed by the Statute of 2 and 3 Edw. 6, c. 1, and more fully by 5 and 6 Edw. 6, c. 1, which 1 Eliz. c. 2, revived, after it had been repealed by 1 Mar., S. 2, c. 2; and it was further prescribed and enforced by the same Act of Elizabeth, and by another made 8 Eliz. c. 1, sec. 3. It is certain then, that the Liturgy established during the interval between the first and the last of these Statutes—that is, between 1548 and 1565—was in force by statutory authority down to the year 1603 (sometimes called 1603 and sometimes 1604, which is owing to the style, the date, if I recollect, being January), when the Canons in questions were made, no alteration whatever having been effected during the interval. It is equally certain that no authority existed to make any alteration, inconsistent with statutory provisions, during that interval; and this consideration seems to dispose of the question which has been argued, both below and here, upon the Canon of 1575. That Canon is to be taken either as professing to make an alteration of the Rubric which the Statute had sanctioned, in which case it can have no force, or as declaratory of the sense of the Rubric; but neither would any such declaration be binding, because the Legislature having

adopted the Rubric, and made it parcel of a Statute, no other authority than a declaratory Act can give it a new meaning; add to which, that the plain intendment of the Rubric appears to have been adhered to, after and notwithstanding the Canon of 1575, and not the sense which that Canon seems to give the Rubric, and which we must indeed admit that Canon purports to give it. The Canon of 1575 appears never to have excited any attention, and if it ever received the royal assent (which is doubtful), it certainly was not cited on either side during the controversy on the subject of baptism at the Hampton-Court Conferences.

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We are, therefore, to see what the Rubric prescribed at and prior to 1603—this being the statutory provision then in force; and, adopting the Common Law prevailing for 1,400 years over Christian Europe. In the first place, no prohibition of the burial service for unbaptized persons, or indeed for any class of persons, is to be found in the Liturgies of Edward and of Elizabeth. The exception of unbaptized persons and suicides first occurs in the Rubric of 1661, and consequently first received the force of law from the Uniformity Act of 1662, after the Restoration. The Statutes of Edward 6 and Elizabeth recognized the right of every person to burial with the Church service, and the 68th Canon, enforcing this civil statutory right, only excepted persons excommunicate and impenitent. Unbaptized persons, therefore—persons baptized in no way whatever—would have had the right of burial according to the service of the Church, if they were not excluded by those portions of the service which appear to regard Christians alone. Those portions would probably exclude persons not Christians; but if an unbaptized person could be regarded as a Christian, then would he not be excluded prior to the Rubric and Statute of 1661 and 1662.

Canon of 1603
did not exclude
" unbaptized "
persons.

But, secondly, and what is much more material to our present inquiry, it is clear that the Rubric, and consequently the Statute, down to 1603, and indeed to 1662, the date of the Uniformity Act, authorized lay baptism, and placed it on the same footing with clerical baptism, in point of efficacy. The Rubric, after setting forth that baptism ought to be ad-

Lay baptism
authorized till
1662.

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Rubrics of
Edward and
Elizabeth.

ministered publicly, and on Sundays and holidays, in order to approach as near as might be to the practice of the primitive Church, which confined it to Easter and Whitsuntide, nevertheless adds, that, if necessity require, children may at all times be baptized at home. A further warning is required to be given to the people against baptizing privately, "without great cause and necessity," and this Rubric is retained in the subsequent forms of prayer, down to the present time. The Rubrics of Edward and Elizabeth then proceed to lay down the rules for administering the baptismal sacrament when it is privately performed; and herein those Rubrics materially differ from the subsequent ones of 1603 and 1661. They require "them that be present to say the Lord's Prayer, if the time will suffer;" and the Rubrics add, "then one of them," that is, any one of them that be present, "shall name the child, and dip him in water, or pour water upon him, saying these words, 'N., I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost—Amen.'" We may observe, in passing, that there is contemplated a great hurry in the ceremony, because the expression is, "if the time will suffer." This of itself indicates that the circumstances are, or at least may be, such as to prevent the sending or the waiting for a minister. The Rubric goes on to declare the sufficiency of baptism so performed: "And let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again in the church." Nevertheless, the expediency is set forth of afterwards bringing the child to the church, and there presenting him to the minister, that it may be ascertained whether or not the ceremony had been lawfully performed. For this purpose, six questions are to be asked of them that bring the child:—Who baptized it?—Who was present?—Whether they called on God for his grace?—With what matter the child was baptized?—With what words?—and, Whether they think he was lawfully and perfectly baptized? If the answer to these questions prove that "all things were done as they ought to be," then the minister is to say, "I certify you that in this case *ye* (not *you*, the minister, but *ye*, the people) have done well, and according to due order," and he de-

clares the child to have been received into the number of the children of God "by the law of regeneration in baptism;" that is, by the sacrament previously administered in private. If, however, they which bring the child "make an uncertain answer, and say they cannot tell what they thought, said, or did, in that great fear and trouble of mind, as oftentimes it chanceth," then the child is to be baptized publicly, but, as it were, conditionally or provisionally, with this reserve, that the minister shall say, "If thou be not baptized already." This portion of the Rubric is demonstrative, if the former part left any doubt, that the presence of a minister at the private ceremony was not contemplated; for, if it were, what they thought, or said, or did, would be immaterial; and what the minister said and did would have formed the only subject of inquiry; not to mention, that no fear or trouble of mind, at the time of the ceremony, could prevent those who bring the child from recollecting whether there had been a minister present or not. Indeed, the questions would have been differently framed, had the presence of a minister been as essential as the water and the words. It would have been asked, not merely "by whom, and in whose presence," but "was he baptized by a minister?" There can, therefore, be no doubt whatever, that, by these earlier Rubrics, the baptism is deemed valid if performed with water, and in the name of the Trinity, though by lay persons. Assuming, then, that there is no minister present, the Rubric declares the baptism to be without any doubt lawfully and sufficiently administered, though in private.

The same doctrine was held, and the practice formed upon it, in the Roman Catholic Church, from a very early period. It prevailed from the beginning of the third century, and though it formed the subject of controversy between the Eastern and Western Churches, during the succeeding period, it had become universally admitted by both in the time of St. Austin, who flourished in the latter part of the fourth century. In England, as elsewhere, it was held valid. The Constitutions of Archbishop Peecham, in Lyndwood's collection, bearing date 1281, though severely denouncing a layman who shall intrude himself into the

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Do not contemplate the presence of a minister.

Same doctrine held in the early periods of the Church, and in the Roman Church.

JULY 2. office without necessity, yet declare the baptism valid
Escott v. Mastin. which is celebrated by laymen, and state that it is not to be repeated. Whoever did so intrude, was denounced as guilty of "mortal sin;" nevertheless, his act was pronounced to be valid and sufficient, and that it was not necessary the ceremony should be repeated. Now, in all these positions, the necessity can make no kind of difference, unless in excusing the intrusion. If the rite can only be administered by clerical hands—if it be wholly void when administered by a layman—no necessity can give it validity. The consecration of the elements, for the purpose of giving the Eucharist to a dying person, may be as much a matter of urgent necessity as the baptism of an infant in extremities; but, neither in the Roman Catholic, nor in the Reformed Church, was it ever supposed that any extremity could dispense with the interposition of a priest, and enable laymen to administer the sacrament of the Lord's Supper.

The position, therefore, being undeniable that, previous to the year 1603, and at the time the 68th Canon was made, lay baptism, though discountenanced, and even forbidden, unless in case of necessity, was yet valid if performed; and this being the Common Law—not the law made by Statute and Rubric, but by Statute and Rubric plainly recognized and adopted—we are to see if any change was made in that law as it thus stood.

Was any change made?

Rubric of 1661. In the Burial Service, the Rubric of 1603 made no change, but that of 1661 forbade the Burial Service in cases of suicide, excommunication, and persons unbaptized. A right formerly existing was thus taken away, at least in some cases. This makes it fit that we construe the word "unbaptized" strictly—or, which is the same thing, that we give a large construction to "baptized;" and, after the change in the Burial Service, it becomes the more necessary to see that there is a clear and undoubted change in the Rubric relating to baptism, before we admit the baptism to be invalid which was held valid even when the Rubric of the Burial Service had not as yet taken away the rite from all who were unbaptized.

The Rubric of 1603, instead of directing "those present"

in the case of private baptism, as the former Rubrics had done, directs "the lawful minister" to say the prayer, if time permit, and to dip or sprinkle the child, and repeat the words. The Rubric of 1661 explains what shall be intended by "lawful minister," substituting for that expression the words, "minister of the parish, or, in his absence, other lawful minister that can be procured." It then prescribes a prayer to be used by the minister, which prayer is not to be found either in the Liturgies of Edward 6 and Elizabeth, or in that of 1603. We may pass over the Rubric of 1603, both because its substance is more completely contained in that of 1661, and because, until 1662, there was no statutory authority for any change of the law which had been established at the date of 1603 (or 1604), when the Canon in question was made, even if it had been quite clear that the Rubric of that date had changed the former Rubrics. But, as in 1662 the present Uniformity Act of 13 and 14 Car. 2, c. 4, was passed, and gave force and effect to the Rubric of that date, it becomes necessary to see whether or not that Rubric changed the former ones, those of Edward and Elizabeth.

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Now it does not appear that any such change was effected, as the case of the present Appellant must assume, in order to prevail. The words are plainly directory, and do not amount to an imperative alteration of the rule then subsisting. If lay baptism was valid before the new Rubric of 1661, there is nothing in that Rubric to invalidate it. Generally speaking, where any thing is established by statutory provisions, the enactment of a new provision must clearly indicate an intention to abrogate the old; else both will be understood to stand together, if they may. But, more especially, where the Common Law is to be changed, and, most especially, the Common Law which a statutory provision had recognized and enforced, the intention of any new enactment to abrogate it must be plain, to exclude a construction by which both may stand together. This principle, which is plainly founded in reason and common sense, has been largely sanctioned by authority. The distinction which Lord Coke takes in one place, between affirmative and ne-

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The new law
an addition,
not substitution.

gative words, giving more effect to the latter,* has sometimes been denied, at least doubted,† Mr. Hargrave thinks upon a misapprehension.‡ But the rule which is laid down in 2nd Inst., 200, has been adopted by all the authorities, that “a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law.” So Comyns’ *Dig.*,§ and he cites the case *de Jure Ecclesiastico*,¶ which lays down the rule in terms. The case decides, that the penalty attached by the Uniformity Act of Elizabeth, for not reading the Common Prayer, on the second offence, does not take away the same common law penalty on the first offence. Now here the former law being this—“Let lay baptism be valid, but let ministers only perform the rite, unless in case of great necessity;”—and the new law being—“Let lawful ministers baptize;”—it must be taken as an addition to, and not a substitution for, the former, unless the intention plainly appear to make it substitutionary and not cumulative. The proof is on those who would make it substitutionary and abrogatory. But the circumstances and the context seem, on the contrary, to shew that the intention was to make the new Rubric cumulative, and to leave the validity of lay baptism unaltered. The private baptism is expressly confined to cases of “great cause and necessity,” and the want of time is expressly referred to, as being great enough possibly to prevent saying the Lord’s Prayer. How then can it be expected, that time should be given to send for the minister of the parish, and, if he be absent, to procure some other minister? Doubtless, it is required that a minister shall perform the ceremony if he can be procured; but the possibility of there being none, must be understood to have been contemplated. Again, it is directed that if any lawful minister, other than the minister of the parish, performed the ceremony, then the minister of the parish, when the child is brought to him, shall examine how the ceremony had been performed. The

* Co. Litt. 115 a.

† W. Jones, 270. *Lovelace’s Case*, before the Windsor Forest Court, in 1632, in which there is a *dictum* of L. C. J. Richardson.

‡ Note, 154.

§ “Parliament,” B. 23.

¶ 5 Rep. 5, 6.

questions prescribed by the former Rubrics are materially changed;—two are left out,—that respecting calling for grace, and that respecting their opinion of the ceremony having been completed. But an important preamble is inserted, before the question as to the matter and the words:—“Because some things essential to this sacrament may happen to be omitted, through fear or haste, in such times of extremity, therefore, I demand further ‘With what matter and with what words was this child baptized?’” Now it is remarkable, that the essentials here spoken of are the water and the reference to the Trinity;—nothing whatever is said of the minister being essential. The questions as to who baptized, and who were present, are given without any preamble at all, indicating that the water and the invocation of the Trinity are essentials, while the presence of a minister is only expedient; a matter to be inquired into for the purpose of correction or censure if it was omitted without necessity; but not essential, as those things wherein consisted the very rite itself, the water and the words. The water and the words are afterwards again stated to be “essential parts of baptism,” in the Rubric which provides for the case of a doubtful baptism, sometimes called conditional. If it were assumed that, in every case, a lawful minister was necessary, and that there could be no baptism without his presence, the only necessary question to be answered by those who brought the child, would be, whether such minister officiated or not, for it might be assumed that he used the matter and the words prescribed, inasmuch as he would be punishable if he did not. The whole direction as to conditional baptism is very material to be regarded, and no part more so than the last Rubric relating to it. If the answers are uncertain, the baptism is to be made, but provisionally or conditionally. What kind of uncertainty is contemplated? If a minister had been essential, surely any uncertainty as to who performed the ceremony would have been specified as a ground of conditional baptism. But nothing of the kind is to be found in the Rubrics of 1603 and 1661, any more than in those of Edward and Elizabeth. Nay, the uncertainty is more

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The water and the words, the essentials in the rite; the minister expedient only.

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specifically confined to the water and the words in the later than in the earlier Rubrics :—"If it cannot appear that the child was baptized with water, in the name of the Father, and of the Son, and of the Holy Ghost, which," adds the Rubric, "are essential parts of baptism," then—and then only—is the child to be baptized, and conditionally.

The question directed to be put, as to who baptized the child, clearly proves nothing as to the necessity of a minister, for another question immediately follows, which relates to a matter that must, on all hands, be admitted to be any thing rather than essential, namely,—“Who were present at the ceremony?” And if it be said that this might be asked, not as a substantive question, the answer to which is essentially necessary, but as a question, the answer to which may tend to facilitate other inquiries, and to explain other answers; in the same way it may be said, that the answer to the first question, “Who baptized the child?”—may be used simply for the purpose of explanation as to the really essential matters—the water, and the words.

Changes made touching uncertain and conditional baptism, do not abrogate the former law.

The changes made in the Rubric, touching uncertain and conditional baptism, are mainly relied upon to shew, that the Rubrics of 1603 and 1661 invalidated lay baptism, and certainly those changes afford the only countenance lent to the negative argument. But they are wholly insufficient to work an abrogation of the former law. The omission of the question,—“Whether they (the people) called for grace and succour in that necessity?”—is said to shew, that the people were no longer to officiate, but only the minister, who had no occasion for that succour. Yet, besides that this seems a very gratuitous position, the persons present were inquired of, and they surely were not material. The question, as to the opinion of the party bringing the child, is also omitted; but it is not omitted in the Rubric of 1603, which, nevertheless, is supposed to negative the validity of lay baptism as much as the Rubric of 1661. Perhaps the most material change in this part of the service is in the certificate, which is no longer that “Ye have done well,” but that “all is well done.” But this, though in the direction of the argument against and lending colour to it, is manifestly

too slender a foundation on which to ground any inference. We must always bear in mind, that it was the intention of those who framed the new Rubric to discountenance all baptism except by a minister, and to assume, as far as possible, that it should by a minister be performed; and the omission of whatever was not quite necessary, and whatever needlessly contemplated a lay administration of the rite, was a natural consequence of this design. But if it had been the intention of those who framed the Rubric to declare lay baptism ineffectual, some express declaration to that effect would have been introduced.

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It is unnecessary to give instances of the difference between positive directions, nay express prohibitions, and such prohibitions as make the thing forbidden to all intents and purposes void. If it were necessary to point out instances of that distinction, the kindred subject of the marriage rite affords one too remarkable to be passed over. There is hardly any country where some solemnity is not required by the directions of the law; there are many in which a departure from the order prescribed by the law is strictly forbidden, and under penalties; but in most Protestant countries the irregular marriage is valid; and in Catholic countries also, up to a comparatively recent date—that of the Council of Trent—though it might be censurable it was valid, without the interposition of a priest, and without any ecclesiastical solemnity whatever. England before the Marriage Act, 26 Geo. 3, c. 33, commonly called Lord Hardwicke's Act, affords one instance of this; Scotland to this day affords another; nay, the existing Marriage Act, 4 Geo. 4, c. 76, presents us with an instance still more remarkable, and bearing more closely upon our present argument, for some of the marriages, to prevent which was the main object of this as of the former Act, are allowed by this latter Act to be valid, and are only valid because they fall not by express declaration within the 22nd section, which certainly confines the invalidity to the cases specified in that section. But if it be said that baptism is a sacrament, which marriage is not, let it be remembered that, in the Romish Church, marriage too was a sacrament, and retained its

Difference between positive directions and prohibitions absolute.

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ably, to the inference that Bishop Butler and Archbishop Secker were never baptized; that the latter, in baptizing George the Third, acted without authority, and that both were disentitled to the burial service, as unbaptized persons, is at least well calculated to make us pause before we admit it to be the law of the land and of the Church.

But it is not less fitted to excite doubts of its soundness before examination, when we reflect that another inevitable consequence would also flow from its admission,—the exclusion from the Church's pale of all Dissenters, and of all foreigners who have been baptized otherwise than by ministers of Episcopal ordination. No *lex loci* is set up, or can be pretended to work any exception in their favour. The Rubric, if it applies to any, applies to them, and unless they shall have been rebaptized, they can neither be ordained, should they embrace our tenets, nor buried with the rites of our Church, should they depart this life within our territory. All these topics, however, are superfluous, when the question has been sifted upon its true merits, and brought to the test of a more rigorous examination, as was done both in the present case by the Court below, and in the former instance before the late learned and able Judge of the Arches' Court, Sir John Nicholl.

Kemp v. Wickes. The case of *Kemp v. Wickes*,* in 1809, was in every respect, as regards the facts, similar to the present. It underwent a full discussion; the only difference was in the course pursued by the defendant in his pleading, which was more commendable than that adopted in this case; and the learned Judge pronounced an elaborate judgment upon the point now before the Court, as to the merits, neither of the preliminary objections having been taken. That judgment does not appear to have given any dissatisfaction in the profession; on the contrary, it is believed to have carried along with it the opinion of lawyers in both the Courts Christian and the Courts of Common Law. We can hardly avoid attaching great weight to a decision pronounced by such an authority, so long acquiesced in, so little objected to, and, generally speaking, so much respected, although no decision

* 3 Phill. 264.

has hitherto been given on the same question in any Court of the last resort.

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It is impossible to mention this judgment of Sir John Nicholl, without adverting to the indecorous terms in which it has been assailed by some reverend persons, who have taken a part in the controversy, and whose zeal, honest no doubt and conscientious, has outstripped their knowledge, and also overmatched their charity. If those feelings had only found a vent in vague charges against the decision, as full of "ignorance and error," and even "impiety," this might have been passed over, as the effusion of a temper heated beyond the bounds of reason with the violence unhappily incident to theological warfare. But an imputation upon the venerable Judge, of "misquoting" the Canon of 1575, and that "with the grossest mis-statements," cannot be so easily passed over; and it is fit that we deny entirely the justice of the charge. He gives the summary of the article, and his abridgment of it, and suppresses no part at all material to the argument. Some of his accusers have made a much greater alteration of his text in quoting his judgment; yet he would have been more just, at least more charitable, had he lived to see this attack and this citation, than to charge its authors with "the grossest mis-statements."

Indecorous
terms it has
been assailed
in.

The Court below justly held that, if the penalty of the Costs. Canon had been incurred, no discretion is left in awarding its infliction. It appears to us, also, that the costs were properly directed to be paid. The Appellant had taken a course which was wholly unnecessary for raising the question of lay baptism, upon which alone his defence was rested, as far as the merits were concerned, or for raising the preliminary objection to the Promovent's rights. Both the one and the other of these points were distinctly raised upon the Articles, and might have been disposed of by meeting that Allegation alone, and disposed of at a comparatively trifling expense. In *Kemp v. Wickes*, that better course was pursued. The Articles, there as here, had detailed the circumstances offered to be proved, and the Defendant at once opposed the admission of them, contending that, be the facts all true

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as alleged, he had acted lawfully, and was guilty of no offence. This might have been just as easily done in the present case; but it has not been done; on the contrary, a proceeding has been resorted to greatly increasing both the delay and expense, and wholly unnecessary for raising the only questions intended to be discussed between the parties.

Sentence affirmed, with costs.

The sentence appealed from must, therefore, be affirmed, in all its parts, and the Appellant must further pay the costs of this appeal.

Misapprehension of the nature and ground of this proceeding.

The strange misapprehensions, which have been entertained by some worthy men, touching the nature and grounds of this proceeding, and the force of the sentence that has closed it, seem to impose upon us the duty of stating in what the offence consists, and what authority the Courts Christian exercise respecting it. The notion has been ventilated, that the Court in this case assumes to direct clergymen as to their spiritual duties, and to bind them (as it has been termed) by ordering what they shall do in future. It has also been suggested by high ecclesiastical authority (a reverend prelate so stated in 1826), in reference to the decision of 1809, that they who think the sentence contrary to the Rubric, may conscientiously submit to the law as interpreted by the Judge, or may not less "conscientiously refuse to read the service, if prepared to risk the expense of prosecution, and make the ultimate appeal." Now, let it be once for all understood, that the Court has never in these cases assumed any such office as that of dictating to, or directing, or even warning, clergymen touching the discharge of their duties. Nor has it interfered, nor does it in any way occupy itself, with the spiritual portion of their sacred office. But the law has required clergymen to do certain things, under a certain penalty, which it has annexed to disobedience; and the same law has required the Judge to enforce that penalty, when his office is promoted by a competent party; and he (the Judge) is left without any choice whether he shall or shall not exercise his judicial functions. Nor let it be imagined that any one's conscience is thus forced. Whoever conscientiously disagrees with the Court in the construction put upon the Rubric, may, if he also con-

scientifically thinks that he cannot yield obedience to the law as delivered by the Court, give up an office to which the law has annexed duties that his conscience forbids him to perform. The case of such clergymen is not peculiar. Persons in a judicial station have, and very recently, felt scruples about administering oaths in the discharge of their magisterial functions. What course did they pursue to seek relief for their conscience, without violating their duty as good citizens? They did not complain that their conscience was forced; they did not retain the emoluments of a station of which their conscience forbade them to discharge the duties; they sacrificed their interests to their duty, and gave way to those who could honestly fill the place, and honestly hold the office, by performing its appointed functions.

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Proctors:—*Glennie* for the Appellant; *Iggulden* for the Respondent.*

Prerogative Court of Canterbury.

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IN THE GOODS OF SOLOMON ESCOTT, DEC.—*Motion.*— Insertions of the date made in a will and a codicil, after the death of the testator, by the solicitor who drew the codicil.—Probate of the instruments decreed as they originally stood.

The testator died 24th March, 1842, leaving a will, bearing date in December, 1838, the day having been in blank at the time of execution, and a codicil dated 5th July, 1841, referring to the will as dated in [blank] December, 1838. The will, as well as the codicil, was attested by two witnesses. When the executors brought the will and codicil to the Registry for probate, an affidavit was called for to explain the blank in the date. The form of an affidavit was accordingly sent down to the country to the solicitor who drew the codicil, who, before the witness was sworn to the affidavit, inserted the words “twenty-first” in both will and

* The Committee consisted of Lord Brougham, Lord Wynford, Mr. Justice Erskine, and Dr. Lushington.

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codicil, annexing the codicil; and he had made affidavit that he made the alterations "in the belief that it was right and proper to do so." The property was under £600.

MOTION.

Haggard, D., moved for probate of the will and codicil as they originally stood.

DECREER.

SIR H. JENNER FUST.—It is a most extraordinary thing that a solicitor should believe it right and proper to make an insertion in a will, of which he was not even the drawer, after the death of the testator. How can the Court ever be safe if solicitors have a right to make alterations in wills after testators are dead? I cannot understand what the solicitor means by swearing that he considered it right and proper to do this. Had it been done by an ignorant person,

Court must grant probate of the papers as they originally stood.

there might have been some excuse for it. The Court, however, has no choice; it must grant probate of the papers as they originally stood, but it may mark its displeasure at the act, and I wish the solicitor were in some way before the Court, that it might condemn him in the costs.

Barlow, Proctor.

JULY 19.

Attestation.—The subscribed witnesses to a will, purporting to have been signed in their presence, being unable to depose that it was so signed, or that there had been any acknowledgment, express or implied, of the signature, in their presence, the paper held to be invalid. — What amounts to acknowledgment.

ILOTT v. GENGE.—Cause.—The deceased, the Rev. Henry Masterman, vicar of Milton Abbas, Dorset, who died 8th December, 1841, left a will in his own handwriting, dated 8th September, 1841; it was signed by him, and the attestation-clause purported that it had been "signed, sealed, and delivered in the presence of" three subscribed witnesses. The will bequeathed legacies to friends and servants of the testator, some of considerable amount. It was propounded by Mr. J. A. Ilott, one of the executors, in an Allegation which pleaded as follows:—

That the testator subscribed the will in the presence of two witnesses present at the same time; that, on the 8th September, 1841, he called on Samuel Hopkins, the parish clerk, who was at work as a tailor in his shop, with Henry Eaton, his son-in-law, and said he wanted them to come to his house and sign a paper for him; that they went, and walking into his study, found him standing at his writing-desk, which was so placed on a small table, near the wall, that his back was turned towards them as they entered; that the testator said, "I want you to sign this paper for me," and

then, turning round again to his writing-desk, and still standing up, did something with the paper, and it appeared to them, from his attitude and manner, that he was writing upon it; that, after a short interval, during which the testator was so employed, he moved the paper from the desk and put it on the table, and desired Hopkins and Eaton to "sign their names there," which they did in his presence; that the upper part of the paper was so folded or turned down as to conceal the writing on the concluding part, so that they could not see whether or no there was any signature or seal to it; that the testator, on the same afternoon, called on John Chaffey, and requested him to put his name to the paper, which he did, the paper being again so folded or turned down as to conceal the writing on the concluding part; that neither Hopkins nor Eaton was present when this third person signed.

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The signature of the deceased and the date of the year appeared to have been inserted after the body of the will was written.

The evidence of the two witnesses, Hopkins and Eaton, was to Evidence. this effect. The former, who was eighty years of age, stated that, on the day in question, the deceased came into his shop, and said, "I want to hinder you and Henry a few minutes, to sign a paper for me;" that he went away, and they followed in a few minutes, and went up into the study, the door of which was open; that the room is small, and the deceased was standing at a table on which was a little desk, his back to the witnesses, directly opposite to the door; that he was doing something to a paper which was before him, for the witness could see a portion of it, and thought he was folding it; he stood leaning forward; the witness could not swear that he was not writing, but he thinks, if he was writing when they went in, he should have seen and remembered his putting the pen into the little glass inkstand in which it was when he saw it; that the deceased often stood to write his name; that the witness and Eaton stood for perhaps a minute about two paces behind him, and then, turning round, the deceased saw them, and said, having the paper in his hand, "He wished them to do a little job for him;" that the deceased, holding the paper down on the desk with one hand, told the witness to sign his name "there," pointing with the other hand; that the witness saw no writing upon it at all; it was folded in such a manner that whatever was upon it was covered by the folding of it down; that, when the witness and Eaton had signed, the deceased said that would do, and, taking up the paper, put it into an

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open part of the desk, as if to dry; the witness saw no blotting paper: that not another word was said concerning what they had been doing when they went away, having been with the deceased on the occasion about ten minutes, or something more. On the interrogatories, this witness deposed that the deceased did not shew his signature to him, if it was there, nor acknowledge it by any words: the witness's belief is, that he did not sign his name in their presence, and the deceased did not, to witness's knowledge, do any thing to the paper after turning round to them, which was not more than two minutes from the time they went into the study.

The other witness, Eaton, deposed that, after the deceased left their shop, they were not more than five minutes after him, and when they entered the study, he was standing at his writing-desk, facing the doorway, so he had his back to them as they entered; he was a tall man, and had to stoop if he stood to do anything at the desk; when they entered, apparently (for witness saw only his back), he was leaning over the desk, doing something to, or else looking at, what was on it, which was a paper; that they had just entered the room, when the deceased, turning half round, said he wanted them "to sign this paper for him," and holding a folded paper so covered, that there was no telling whether there was any thing on it or not, or what was on it, he pointed to where they should sign, which was close under where the upper part of the paper folded down upon it: the deceased never said what it was they were signing, and after they had signed, never said a word about what they had been signing; from the time they entered the room till they signed their names, would not be more than five or six minutes; apparently, he was getting the paper ready for them to sign when they went in; when the deceased turned aside to make way for Hopkins to sign, the pen was standing in the inkstand; the witness should rather say that Mr. Masterman did not, than that he did, write on the paper while the witnesses were with him; he doubts if there was time for him to have written and folded the paper too; he certainly did not tell them what paper it was they were signing; the witness saw no writing on the paper and no seal; the deceased did by some means cover the paper all up except just the space left for them to sign. On interrogatory, this witness stated that he cannot depose that the deceased did either sign his name or acknowledge his signature in his (the witness's) presence, or say whether he was writing or not from his manner when they entered the room.

John Chaffey, the third witness, states that, when the deceased brought the papers to him to sign, it was twilight, and he did not notice what was on it besides the names of Hopkins and Eaton; it was partly folded, so that he saw no seal.

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The will was opposed by Mrs. Mary Genge, widow, a second cousin of the deceased, and one of the next of kin, on the ground that it was not executed as required by the Statute. The property was about £15,000.

Haggard, D., in support of the will, argued that there had been a sufficient acknowledgment, and cited an unreported case at Nisi Prius, *Doe dem. Jackson v. Jackson*,* as well as *White v. Trustees of British Museum*.†

ARGUMENT.

* This was an action tried at York Spring Assizes, 16th March, 1842, before Mr. Baron Parke, the question being whether a testator had acknowledged his signature to the will in question in the presence of two witnesses present at the same time, in conformity to the Statute. The circumstances of the case, as detailed by the attesting witness examined, were these: the deceased was a linen-manufacturer at Barnsley; one afternoon, he called T. C., one of his clerks, from the counting-house in which they sat, into a smaller one, the door of separation being partly glazed, when he pulled his will, signed by him, out of his pocket, and shutting the door, gave it into T. C.'s hand, telling him to read it. T. C. observed, "This purports to be your will?" The deceased replied, "Yes, but I don't intend it to be so; when I am dead and gone, my will will be very different from that:" adding, that he merely intended it as a memorandum in case any thing should occur to him. The deceased then asked T. C. who was a likely person to sign it along with him; and T. C. mentioned W. R., another clerk, then in the larger adjoining counting-house. The deceased objected to W. R., saying he expected he was going to leave in a few weeks, and he did not want him to know any thing about it. T. C., however, pressed the deceased to call in W. R., upon which he assented, and T. C. opened a small casement in the glass window between the two offices, and called W. R. (then sitting with his back to that window) into the smaller office. When W. R. came in, T. C. said to him, "Mr. J. (the deceased) wants you to sign this paper," meaning the will, then lying on a book on a desk. W. R. came to the desk and signed it, standing between T. C. and the deceased, the latter having his arm laid lengthwise upon the paper across it; but T. C. could not (on his examination) positively say whether the arm covered the signature and seal or not. W. R., in signing, wrote the word "witness." Upon his leaving the room, the deceased, who never spoke during the time W. R. was present, shut the door, and T. C. then signed the paper in the presence

† 6 Bing. 310; 3 Moore and P. 689.

JULY 19. *R. Phillimore, D.*, on the same side, cited Sugden, *Essay on the Law of Wills*;* Williams, *Law of Executors*;† Jarman on *Wills*.‡

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Addams, D., for the party opposing the will, contended that the cases did not apply, and that there was no proof that the signature had been made to the will when the supposed acknowledgment took place.

Curteis, D., on the same side.

Haggard and R. Phillimore, in reply, cited in addition:—*Starkie, Ev.*!;§ *Peate v. Ougley*;|| *Brooke v. Kent*.¶

JUDGMENT.

SIR H. JENNER FUST.—This will appears to have been very maturely considered by the deceased; it is an officious will, as it disposes of the property amongst those for whom he had a regard and affection (although he has not bequeathed any thing to the person opposing the will, except that he has

presence of the deceased, who put it into his pocket and went out. T. C., on his cross-examination, stated that the deceased laid strict injunctions upon him not to inform W. R. that the paper was his will. He had no doubt the deceased's arm covered the signature. After W. R. went out of the room, the deceased again told T. C. not to tell him any thing about what was in the paper. W. R. was subpoena'd on the trial, but refused to attend. Mr. Baron Parke intimated his opinion that the lessor of the plaintiff (the party supporting the will) had not proved his case; that the signature was concealed by the deceased, and that it was quite certain that he meant W. R. not to know that it was his will. The learned Judge left it for the Jury to say whether the deceased, in sending for W. R. (whom he sent for, no doubt, to be a witness to some complete act and instrument of his), meant that as an acknowledgment of his signature. The Jury found "for the plaintiff." *Mr. Baron Parke*: "You think he meant to acknowledge his signature?" *Foreman*: "Yea." *Mr. Baron Parke*: "You are of opinion he meant to acknowledge his signature to the witness, though he put his hand upon the paper?" *Foreman*: "We think he meant to keep it secret from W. R., but to make it a perfect instrument." *Mr. Baron Parke*: "The verdict is for the lessor of the plaintiff. The Statute does not appear to make it necessary that both witnesses should be present at the time they attest: if the testator should acknowledge his signature in the presence of both, and the Jury think he meant to do so by the fact of calling in W. R. as a witness, it does not appear to be necessary that both should attest at the same time."

* C. 8, p. 140.

† 1 vol. 56.

‡ 1 vol. 71, 73, 99.

§ P. 1, 685.

|| Comyns, 196.

¶ *Ante*, p. 93.

not disposed of the residue) ; it is, therefore, a will which the Court is bound to endeavour to support, if it can do so under the present Act, and there is no doubt that it was the intention of the deceased that it should operate as a perfect disposition of his property.

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The proposition averred in the commencement of the Allegation is, that the paper was subscribed by the deceased in the presence of two witnesses present at the same time ; but it is clear from what follows, that it was not intended to rely solely upon this averment, for, subsequently, circumstances are pleaded which would lead the Court to the conclusion that the will was not so executed, and therefore it can hardly be said that the party takes upon himself to aver, so as to make the whole case rest upon that averment, that the deceased did execute the will in the presence of two witnesses present together.

Nature of the Plea.

The question is, whether, as the witnesses did not see the testator actually write his name, so as to be able to say that he did sign the will in their presence, there is sufficient evidence that there was a signing of the will by the deceased in the presence of two witnesses and which they attested ; or, supposing there is not evidence of that fact, whether an acknowledgment of the signature in the presence of two witnesses is sufficiently established : for although from the terms of the Allegation it would appear that nothing is suggested as to the acknowledgment of the signature, yet it is to be inferred that it was meant that, if the deceased did not sign the will, he acknowledged his signature, in the presence of the witnesses ; so that the Court may consider itself in a situation to dispose of that question, notwithstanding the want of a formal plea to that effect.

Questions.

Now the result of the evidence does not, I think, come up to the case pleaded, namely, that, from the manner of the deceased at the time, it can be considered that he was writing when the witnesses entered the room, or even that the signature was at that time made to the will. Hopkins, so far from saying that the deceased appeared to be writing upon the paper, says " I think he was folding it," and from the evidence of this witness, the operation must have taken

Evidence does not come up to the Plea.

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some time, and it must have required some ingenuity to conceal from the witnesses the whole of the writing, if the attestation clause had been written at the time the body of the will was written ; and it is quite clear that he did not see the subscription of the deceased at the time the paper was produced to him. This witness says that the subject has been much talked about in the village, and that he had been asked why he could not swear at once that he had seen the deceased sign his name ; yet the impression on his mind is such that he cannot say the deceased did sign his name in his presence, though he cannot say he did not. The other witness, Eaton, hardly goes further than his father-in-law, if so far. The impression on the mind of this witness is that the deceased was doing something to the paper, or looking at it, or getting it ready for them to sign, when they entered ; Hopkins thought he was folding it. Neither has deposed that the deceased put the pen into the inkstand after using it. Eaton, on interrogatory, says he cannot depose that the deceased did either sign his name or acknowledge his signature in his presence, and that he did not see any thing written on the paper at the time he signed it.

These were the only witnesses present at the alleged execution ; the deceased took the paper in the afternoon of the same day to a third witness, and requested him to sign his name at the bottom of the attestation-clause, not telling him what the paper was.

Its general
result.

What then is the general result of this evidence ? That the deceased asked the two witnesses to come and do a job for him ; that is, to sign a paper ; that they went into the room, and at the time they entered it, the deceased was at a table, standing at a little desk ; that, being a tall person, he had to stoop or lean if he stood to do any thing at the desk, and he was "doing something" to the paper at the time. It is the impression of Hopkins that he was folding the paper ; the other witness thinks he was getting the paper ready for them to sign ; but neither can take upon himself to swear that he saw the deceased sign his name to the paper ; or that he used the pen, or had the pen in his hand ; or that he saw him put the pen back in the inkstand ; they will not swear

that the deceased signed the paper in their presence, or that it is their impression that he did so; on the contrary, it is their impression that he did not,—rather that he did not sign his name, than that he did. JULY 19.
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It has been said that, with reference to cases and to the principles adopted in respect to the execution of wills, something is to be inferred from the attestation-clause, which purports that the paper was “signed, sealed, and delivered” in the presence of the witnesses; and perhaps something might have turned upon this if there was no circumstance to shew that the deceased himself considered it otherwise. This is not a case in which the witnesses are deposing against their own attestation, for their evidence is, that the deceased told them merely to sign their names, and that they did not see the attestation-clause. But the circumstance to which I alluded, and which, so far from making in favour of the deceased’s having signed in the presence of the witnesses, has a contrary effect, is, that, on the same afternoon, he took the paper to another witness, and requested him to sign the attestation-clause under the names of the witnesses who had already attested, and he resorts to similar skill and ingenuity to conceal the contents of the paper from this person as he had employed with the other witnesses: and this last witness says there was no seal on the paper when he saw it. The attestation-clause.

Not seen by the witnesses.

It has been said that the Court may presume, from the circumstances stated, that the paper was signed at the time the witnesses were in the room. I cannot think that the Court is at liberty to presume this against the impression in the minds of the witnesses themselves, that the deceased was not writing at the time they entered; that he was folding up the paper, or getting it ready for them to sign. It is for the party propounding the paper to shew that the requisites of the Act have been complied with, and I cannot satisfy myself from the result of the evidence of the witnesses that the paper was signed in their presence. Presumption from circumstances.

Not to be taken against the impression of the witnesses.

This brings me to the second point, namely, whether there was an acknowledgment of the signature in their presence. It is not contended that there was any express acknowledgment. Acknowledgment.
None in terms.

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A virtual acknowledgment contended for.

What amounts to such.

ment, in terms; that the deceased said, "This is my signature, and I request you to attest it;" therefore, the case must rest on a virtual acknowledgment, and, accordingly, the principal part of the argument was to shew that the circumstances spoken to by the witnesses amount to a virtual acknowledgment. It is not necessary that the deceased should declare the signature to be his, but a production of the paper openly, with his name to it, and a request to the witnesses to attest it, would be a sufficient acknowledgment: this is the interpretation which the Court has put upon the Act in the cases which have come before it on motion. It has been argued ingeniously and forcibly, with reference to decided cases of wills before the 1st January, 1838, that what was done in this case is sufficient to shew acknowledgment.

Terms of the old law and of the present.
The old law.

Construction of it.

The new law.

In the first place, it is necessary to consider the wording of the two Statutes,—the Stat. of Frauds, 29 Car. 2, c. 3, sec. 5, and 1 Vict. c. 26, sec. 9. By the former, the will was to be signed by the party devising, or by some other person in his presence and by his express direction, and "attested and subscribed in the presence of the devisor, by three or four credible witnesses." Under this Statute, it has been held that it is unnecessary that the witnesses should see the testator actually sign; his acknowledgment was sufficient, and it was not even necessary that the acknowledgment should be made to the witnesses at the same time; it might be made to each witness separately: the effect of these decisions is that the simultaneous presence of three witnesses was not necessary. *Grayson v. Atkinson*; * *Jones v. Lake*; † *Stonehouse v. Evelyn*; ‡ *Ellis v. Smith*; § *Wright v. Wright*. ¶ In other cases it has been determined that a request to the witnesses to subscribe their names as witnesses, without the nature of the instrument being stated, is a sufficient acknowledgment of a will. *Trustees of the British Museum v. White*; *Johnson v. Johnson*; ¶¶ *Jarman, on Wills*. ** The law as it

* 2 Ves. 454.

† 3 P. Wms. 254.

‡ 5 M. and P. 316.

** 1 Vol. 71, 73.

† 2 Atk. 176, in note.

§ 1 Ves. jun. 11.

¶ 1 Crompt. and M. 140.

now stands requires that the will shall be signed at the foot or end by the testator or by some other person in his presence and by his direction, "and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time." Here is an express enactment that, not the *will*, but the *signature*, must be acknowledged by the testator in the presence of two or more witnesses present at the same time; and the question is, whether there has been such an acknowledgment of his signature by the testator in this case.

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The *signature*,
not the *will*,
must be ac-
knowledgeed.

The first observation which occurs, on considering the words of the late Statute, is the distinction between them and those of the Statute of Frauds,—that is, as to an acknowledgment of the *signature* of the testator, for nothing of the kind is required by the Statute of Frauds. It is said that the attention of the Legislature was called to the manner in which acknowledgment was construed under the Statute of Frauds, for the law was at that time settled, that a virtual acknowledgment was sufficient, provided the paper was seen. At all events, the Legislature has laid down in distinct terms what is now necessary, namely, that the signature of the testator shall be acknowledged, and this leads *primâ facie* to the inference that it is necessary that the witnesses should see that there was a signature to the will; that they should know that the paper had been actually signed at the time, and that could only be by their seeing the signature, or by hearing the declaration of the deceased that he had signed it, though there might be a question whether even such a declaration would be sufficient. How is it possible that a signature shall be acknowledged unless the witnesses have an opportunity of seeing it? The construction I am inclined to put upon the Statute is, that it is not necessary for a testator to say, in so many words, "This is my signature to my will;" but that, where there is an actual production of the paper, and the name of the testator is subscribed to it, and there is an opportunity given to the witnesses to see the signature, it would be a compliance with the Act.

Distinction
between the
two Statutes.

Necessary that
the witnesses
should know
that the paper
was signed.

How far is this part of the case affected by the decisions Cases.

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Holt v. Gange.

which have been referred to, and particularly that of the *Trustees of the British Museum v. White*, as reported in 6 Bingham, 310? That decision was pronounced upon a special verdict, where the facts are established by the verdict, and the Court is called upon to determine a point of law. The special verdict in that case found that the will, which was written by the testator, had been signed by him before it was produced to either of the three subscribed witnesses. Two of them signed the paper at the request of the testator, in his presence; but they did not see his signature, and were not informed by him what was the nature of the paper, or the purpose for which he requested them to sign it. Two months after, the testator requested the third witness to sign the paper, which he did in the presence of the testator, who at such time informed him that it was his will. It appeared that the signing of the three names could not have been done for any other purpose than to make them witnesses to the will, and that, immediately above the names, was written by the testator, "In the presence of us, as witnesses thereto." Lord C. J. Tindal, in delivering the judgment of the Court of Common Pleas, expressed himself as follows:—

Brit. Mus. v. White.

The objection to the execution of the present will does not rest upon the point that it was not signed by William White (the testator) in their presence; but that, with respect to two of the witnesses, there was no acknowledgment of his signature, nor any declaration that it was his will; but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written; and it is argued that if such subscription of their names satisfy the intention of the Statute, the word *attested* will have no force whatever, and may be considered as if it had never been inserted. The question, however, appears to us to be, whether upon this special verdict the finding of the Jury establishes, although not an acknowledgment in words, yet an acknowledgment in fact, by the Devisor to the subscribing witnesses, that this instrument was his will? for if by what the Devisor has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, we think the attestation of the witnesses must be considered as complete, and that this case falls within the principle of that of *Ellis v. Smith*. In the execution of wills, as well as

that of deeds, the maxim will hold good, *non quod dictum, sed quod factum est, inspicitur*. The paper in question is the very paper-writing which was produced by the testator to the three witnesses. The great object of the direction of the Statute, that the witnesses shall subscribe in the presence of the Devisor, was to prevent the possibility of the witnesses returning to his hands any other instrument than the very instrument which he delivered to them to attest. The object has been attained in the present case, and the identity of the instrument is beyond dispute. In the next place, it appears from the special verdict, that the Devisor was conscious himself that this instrument was his will, for the verdict finds that he was of sound and disposing mind, both at the time he signed it himself, and also at the time when the witnesses subscribed their names. But further; it appears from inspection of the instrument set out in the special verdict, that the signature of the three names could not possibly enure to charge themselves or any other person, and could not have been done for any other purpose whatever than simply to make themselves witnesses to the will. And lastly, it appears from the same inspection, that, immediately above the names of the witnesses, are written in the handwriting of the Testator these words: "In presence of us, as witnesses thereto;" which do amount to a clear and unequivocal indication of the Testator's intention that they should be witnesses to his will. When, therefore, we find that the Testator knew this instrument to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him, we think the Testator did acknowledge in fact, though not in words, to three witnesses, that the will was his: for whatever might have been the doubt upon the true construction of the Statute, if the case were *res integra*, yet, as the law is now fully settled, that the Testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the Statute, though such acknowledgment conveys no intimation whatever or means of knowledge, either of the nature of the instrument, or acknowledgment of his signing, we think the facts of the present case place the Testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and we do, therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the Statute.

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*Hott v. Genge.*Result of cases,
under old law.No evidence
that the will in
this case was
signed.*Jackson v.
Jackson.*Observations
per Mr. Baron
Parke.

All the other cases appear to me to be only determinations of the same point under the Statute of Frauds, and the result is, that where a testator has written a will himself, and has signed it, and where the will so signed (this fact must not be lost sight of) is produced to the witnesses, and he desires them to attest it, it amounts to an acknowledgment of the instrument being that person's will, in fact, though not in words. But, under the present Statute, I am bound to hold that the deceased must acknowledge his signature to his will, not his will merely, and there is no evidence to satisfy my mind in this case that the will was signed at the time it was produced to the witnesses: it is not sufficient merely to produce the paper, where it does not appear that the signature of the deceased was to it at the time. So far, then, the Court would hold this case to be distinguished from the cases under the Statute of Frauds, as in all those cases (except, perhaps, that of *Peate v. Ogley*) the will was signed before it was produced to the witnesses. *

But a case has been referred to, that of *Doe on dem. Jackson v. Jackson*, which applies very materially to the construction of the present Statute, and is a decision upon it. In that case, it is clear that the second witness could not see the signature, but there is no doubt that the paper was signed at the time when it was produced to both witnesses, and that both attested in the presence of the deceased. Whether the first witness, who read the will, attested in the presence of the other witness, is not material, as it is not necessary that the witnesses should attest in the presence of each other, but only that the deceased should sign his name or acknowledge his signature in the presence of two witnesses present at the same time. The observations of Mr. Baron Parke, in summing up, are worthy of very great attention. I think the learned Judge rather expected the verdict would have gone the other way. He observes:—

It was held by the Court of Common Pleas, that it is not necessary there should be a verbal acknowledgment of the signature, but that if it appears clear on the facts, that the Testator meant to acknowledge at that time, it will do equally well though he says

nothing. Then, in order to do that, it is necessary that there should be some act of acknowledgment by the Testator. The question I must leave to you is, whether that occurs in the present case. You must recollect that it is for the lessor of the plaintiff to prove it to your satisfaction. I think there can be no doubt, by sending for W. R., and W. R. coming into the room to be a witness, that the Testator meant that W. R. should be a witness to some complete act and instrument of his; but whether he meant that as an acknowledgment of his signature to W. R. is for you to say. He seems to have been aware that there should be two witnesses. It is quite clear he did not mean W. R. to know that that was a will. The question hereafter may be, whether an instrument so executed will be sufficient. It is quite clear that the deceased put his arm on the paper for the purpose of concealing something, for it was laid at the side of the paper where the signature was, for W. R. was to put his name on the other side as a witness. It is for the lessor of the plaintiff to shew that the signature was exposed. If the Testator, though he had not said a word, had pointed to it with his finger, that would have been a good acknowledgment in point of fact. If the blotting-paper had been just put to cover the signature, that would effectually preclude any presumption that the Testator meant to acknowledge his signature in the presence of the witness. It appears since, that the Testator has put his seal; but that makes no difference in point of law. It is for you to say whether the Testator, under such circumstances, meant to acknowledge his signature. That he meant that that should be executed as a complete instrument, there is no doubt. If that is sufficient to make it a valid will, is a matter that will be disposed of by the Court above. It is proposed that you shall find a special verdict, for there is no dispute about any thing except the probable inference of fact. I wish you to give your opinion on the question, if you think the Testator, on this evidence, meant that W. R. should see his signature, or meant to acknowledge it to him.

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Ilott v. Genge.

In that case, the will was complete at the time it was produced to the witnesses, being signed by the testator, and only required his acknowledgment of the signature. From the observation of Mr. Baron Parke, if, as in the present case, the testator had folded the paper so as to prevent the witness from seeing his name, that would be a strong presumption that he did not mean to acknowledge his signature in the presence of that witness. The Jury in that case found

Distinction
between the
cases.

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Hott v. Genge.

Not a decision
 binding on this
 Court.

The signature
 to the will not
 acknowledged,
 nor made, in the
 presence of wit-
 nesses.

Pronounced
 against.

that the will was duly executed: it certainly appears strange that, where such means were taken to prevent the witness from seeing the will, there should have been an acknowledgment of the signature. If that had been a case decided by the Court on a question of law, it would have a very important bearing on the present, differing from it in one respect—namely, that, in the present case, the will is not proved to have been signed at the time. But I think it is clear that Mr. Baron Parke expected that a special verdict would have been returned, finding particular facts, and leaving the Court to dispose of the question, whether there had or had not been a due execution of the will. But the Jury decided that there was an acknowledgment of the signature, and it does not appear to me that, under the circumstances, I should consider this decision binding upon this Court, more especially as the learned Baron admits that, in such a case as this, there would be strong doubt whether there had been a compliance with the Act.

I am of opinion that the signature to the will in this case was not acknowledged either expressly or virtually within the meaning of the Statute, and the impression of the witnesses being that it was not signed in their presence, the conclusion of the Court is, that the will was not validly executed according to the provisions of the Statute, and I accordingly pronounce against it.

Proctors:—*F. Dyke* for the executor; *Wills* for the next of kin.

High Court of Admiralty.

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Collision.—
 Action against
 a Queen's ship
 sustained;—
 judgment for
 damages and
 costs.

HER MAJESTY'S SHIP "ATHOL."—*Act on Petition.*—
 This was a case of collision between her Majesty's ship of war *Athol*, with troops, from Barbadoes to Portsmouth, and the brig *Jane Clark*, coal-laden, which occurred on the 7th March, off the Lisard. On the part of the owners of the latter vessel, it was alleged and sworn, that she was pro-

ceeding down Channel, close-hauled on the larboard tack, and lying W. b. N., at half-past two in the morning, it being dark and cloudy, with the wind S. W. b. W. ; owing to the wind freshening, the whole of the watch were employed clewing the fore-top-gallant sail, and as good a look-out was kept as their situation admitted ; that the *Athol* was seen three points on their weather bow, distance five or six times their own length, steering to the S. & E. ; that the *Jane Clark* put her helm up (or hard to port), and payed off immediately four points from the wind (to N. W. b. N.) ; that the *Athol*, instead of putting her helm to port, in the first instance, put it to the starboard, and kept it there till almost at the very instant of the collision, and that the brig was struck with such force amidships that she sank almost immediately, the master and crew escaping on board the *Athol*. On the part of her Majesty's ship, it was alleged and sworn that she was running up channel with the wind at S. S. W., steering E. S. E., the night being extremely dark and cloudy, with thick, drizzling rain, when a sail was reported by the look-out man nearly a-head, or rather on the weather bow, distant three ship's lengths, and going at the rate of four and a half miles per hour, the *Athol*, seven and a half miles ; that, owing to the extreme darkness of the night, it could not at the instant be made out how the brig was standing, and from her shewing no light, it was thought she did not see the *Athol*, and the helm was, therefore, ordered to starboard by one of the quarter-masters, who had reached the fore-castle before the officer of the watch, who, on coming forward, the vessels being much nearer, having made out that the brig had bore up right across the *Athol's* bow, instantly, and before the helmsman had time to put the helm one-half to starboard, or that she had fallen off to E. b. S., being only one point from her original course, ordered the helm hard to port ; that the ship answered quick, and flew up in the wind ; that, at the time of the collision, her head was S. E., her sails lifting and partly aback, the *Athol's* bowsprit-end striking the brig's mainmast in a slanting position, and carrying it away ; that it appeared from the statement of the man at the helm of

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the *Jane Clark*, taken by Captain Bellamy on board the *Athol*, eight hours after the occurrence, that the brig was lying W. when the *Athol* was first seen, consequently the latter vessel must have been two points or more on the brig's lee bow, and that, before that vessel's helm could take effect, the *Athol* must have been three points on her lee bow; that, consequently, the *Jane Clark* should have kept her wind, and not have bore up across the *Athol's* bow, which was the sole cause of the collision.

A representation of the case was made to the Lords of the Admiralty on the part of the owners of the brig, but their Lordships were of opinion that the circumstances did not call upon them to make compensation. The owners thereupon applied to this Court for a Monition, but the Court, feeling a difficulty in issuing its process in the case of a Queen's ship, directed a communication to the Lords of the Admiralty that such application had been made, and their Lordships ordered that an appearance should be given for her Majesty's ship, in order that this Court might adjudicate upon the question.

The Court was assisted by Trinity Masters.*

ARGUMENT.

Addams, D., and *Elphinstone, D.*, for the *Jane Clark*, contended that that vessel had pursued the proper course, according to the rule of navigation.

Sir John Dodson, Q. A., and *Phillimore, D.*, for her Majesty's ship, argued that, had the vessels been in the position described by the other side, a collision would have been impossible, as they would have left each other in opposite directions; that, by their own account, they had untruly represented the state of the wind, and that from the relative position of the vessels, as described by the *Athol*, the rule of navigation, that the ship on the starboard tack should keep her wind and that on the larboard tack bear up, did not apply; that the *Athol* had a strong light, and the *Jane Clark* none.

SUMMING UP.

DR. LUSHINGTON (addressing the Trinity Masters, after stating the circumstances under which the action was brought).—I now come to explain to you, as briefly but as

* Captain Rees and Captain Locke.

clearly as I can, the duty we have to discharge. First, we must ascertain, as far as we can, from the evidence, the actual facts of the case. Secondly, you must determine, from your nautical knowledge, who was to blame and who was not—who did that which was right, who did that which was wrong—who omitted that which was necessary and proper to be done. These two points being determined, it then becomes my province to speak the conclusion of the law upon such facts as are found by you.

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Now, it almost universally follows, in these instances, The facts.

that the precise facts lie between the statements on both sides; and that, not because the individuals giving their evidence, on both sides, are disposed wilfully to mislead the Court; but because, from the imperfection of human nature, men are apt to take that view of the case which is most favourable to their own interests; and it is one of the great duties of a Court of Justice, uninfluenced by a regard to one or the other, to find the true path amidst conflicting evidence. Without pretending to have any knowledge of, or to advert with any degree of conviction in my own mind to, any rule of navigation, yet I apprehend I may say that, where two vessels are sailing, the one down Channel on a wind, the other coming up Channel, with the wind free—supposing these two vessels to be coming “end on,” as one of the witnesses states here—it is the duty of both vessels to port their helm, and go to larboard. Now, that is a general proposition, and the facts of this case may or may not bring it within it; we must now look to the particular circumstances of the case.

Rule of navigation.

The place where this misfortune occurred is not altogether, The place.

perhaps, destitute of importance, and, fortunately, with respect to that place, there is no difference in the evidence. It appears that, about half-past one o'clock in the morning, the *Jane Clark* had taken her departure, the *Lizard*, at that time, bearing about seven leagues to the north-east: so that you know perfectly well where the vessel was, and know the course she must have pursued in going down Channel an hour afterwards. This being so, let us consider The weather. the next question, namely, the state of the weather. It is

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The Athol.

The wind.

described on the part of the *Athol* to have been thick and cloudy, with small rain; it is described on the part of the *Jane Clark* to have been dark and cloudy weather. It is not stated on either side that the night was intensely dark, nor is it at all attempted to describe it as the contrary. Then, in stating her case, the *Jane Clark* alleges that, the wind being S.W. and by W., she was sailing W. and by N. Now, upon that statement, much observation has been made by her Majesty's Advocate, for the purpose of shewing that it is a statement inconsistent with possibility. You will decide that point. As far as I am capable of comprehending it, I should say, it is an inaccurate description. I think it can hardly have been intended to be represented, by nautical men particularly, that the vessel at that moment was sailing within four points of the wind; and I think there is a consequence inevitably following from the looseness of this statement, namely, that it is imputable to the *Jane Clark* that she has not given her statement with the accuracy which ought to have been expected. They say that, in proceeding with the wind as I have mentioned, and on the larboard tack, and with the head of the ship lying, as I have stated, west and by north, "they descried, three points on the brig's weather bow, distant five or six times her own length, and apparently steering a course to the southward and eastward, with the wind on her starboard quarter and perfectly free, the *Athol*." For the present moment, we will take

Conduct of that statement to be true. Then the first question which will
 the *Jane Clark*: arise is as to the conduct of the *Jane Clark*. What she did was to port her helm, the consequence of which was that she went off four points from the wind, and you will have to determine whether that was a proper measure under the circumstances stated: I should have no hesitation in saying, that she did right in porting her helm under these circumstances; but whether the facts are precisely as stated by the *Jane Clark* is a consideration we must now follow up.

right.

Statement of The statement made on behalf of her Majesty's ship the
 the *Athol*. *Athol* is to the following effect. She states that the wind, instead of being S.W. and by W., was S. S.W.—a difference of three points. I think you will find in all probability that

the wind was really blowing from a quarter somewhat between the two. She states that at that time her course was E.S.E.; and I must say that the statement which follows in this Act on Petition is not couched in that clear and intelligible form that I could have wished it to have been; it is mixed up with a reference to what had been alleged on the part of the *Jane Clark*, with answers to it, and with allegations separate and distinct, so that it is not a very easy task for any person, however conversant with these proceedings, to dissect it in such a manner as to present it as clearly to your view as I could wish, and at the same time with reasonable conciseness. But it is expressly stated that the *Athol*, when the brig was first seen by her, was about two points on the brig's starboard bow, and distant from her only about three times the length of the *Athol*, and steering, as before alleged, E.S.E., with the wind S.S.W. Here is a palpable contradiction, and we must endeavour, if we can, to get at the truth. Both parties may, to a certain extent, be speaking truly and speaking of different times. But I think we have very valuable evidence on the present occasion from the testimony taken on board her Majesty's ship *Athol* the day after the collision. George King had the look-out at the time, and he is asked, "Where was the brig when you first saw her?" Now, he is as likely a person as any one to have seen her the very first on board the *Athol*, because it was his express business to keep the look-out. He must in all probability have seen her as soon as any one else. What does he say? "Nearly right a-head." But there is also the evidence of George Walls, the quarter-master, the very person in consequence of whose orders the helm is put to starboard. He is asked, "What was your reason for supposing the vessel would have gone clear of us sooner by putting the helm to starboard than to port?" It is very important that the answer I am about to read comes out precisely to the same effect as the answer from George King, though the question is entirely different, and put for a totally different purpose, shewing veracity and conformity in the testimony before you: "Because both vessels were coming end on to each other." Now, then, we must arrive

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Evidence.

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at some conclusion between these two conflicting statements, because I apprehend it is very difficult to reconcile the statement made by the *Jane Clark*, that the vessel was seen three points on the larboard, with the statement made on behalf of the *Athol*, that it was two points on the starboard bow. I apprehend it is very difficult to reconcile this with the evidence on board the *Athol*, that the two vessels were coming "end on." Now, taking this to be the state of the facts—that the two vessels came "end on,"—let us see whether the measure pursued by the *Athol* was right or wrong. Take the two to be end on, and then assume that the wind was either as stated by the *Jane Clark* S.W. and by W., or as stated by the *Athol* S.S.W., was starboarding the helm, under existing circumstances, a proper measure? That will be the first and the important question I shall put to you. It does appear to me—and I am bound to state it—not a little singular that, if starboarding the helm were a right measure to be pursued, within three instants (for that is the evidence of Captain Bellamy—of course I do not mean to pin him down to the time, but he means in as short a time as possible), the helm was put to port. The two cannot be right; the one must have been right, the other must have been wrong.

Now, then, looking at all these facts and circumstances, I shall have to ask you whether the measures so pursued by the *Athol* were or were not right, nautically speaking. But I shall also have to ask you another question—whether, in your opinion, the absence of any light being shewn on board the *Jane Clark* was such a dereliction of duty, under the circumstances, and taking into consideration the place where she was found, as would impute to her fairly any blame. I shall also have to ask you whether you think that she did or did not keep the look-out which she ought to have done, bearing in mind the sails she was carrying; the number of the crew she had upon the watch; that four of them were engaged in furling the fore-top-gallant sail at the time that the mate was at the helm; and remembering that this was a merchant vessel, with a crew of only nine or ten men on board, and of course, therefore, she could not have the same

number of persons in the performance of such duties as a ship more strongly manned. These are the circumstances which you will have to determine. You will also have to consider the allegation which has been much dwelt upon in the course of the proceedings, namely, that when the *Athol* first descried the *Jane Clark*, she was in doubt whether the *Jane Clark* was upon the larboard or the starboard tack. Now remember that, on the part of the *Athol*, it is stated that the wind was S.S. W., and you will be able to judge whether a vessel going down Channel, with the wind in that direction, must not have been on the larboard and not upon the starboard tack.

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I believe that I have now brought under your consideration every point which it is necessary to do, with the exception of one. There is undoubtedly a third state of things, as adverted to by the Advocate of the Admiralty—that is, whether this might not be the result of pure accident. You will have the kindness to tell me, first, whether you are of opinion that the people on board the *Athol* were to blame; secondly, whether you think there was any neglect on the part of the people on board the *Jane Clark*; finally, if you think that there was no blame attaching to either party, whether you think that the whole is to be attributed to accident?

CAPTAIN REES.—In my opinion, the *Athol* was in fault, OPINION. in putting the helm to starboard in the first instance. Going down the Channel, with the wind S.S.W., she would of course be on the larboard tack, and both ships ought to have put their helm to port.—[THE COURT. Do you think there was any blame attributable to the people on board the *Jane Clark* ?] I should say not.

THE COURT (to Captain Lock).—Do you agree with that opinion?

CAPTAIN LOCK.—Yes.

DR. LUSHINGTON.—My own opinion coinciding entirely JUDGMENT. with that of the Trinity Masters, I must pronounce for the damage, with costs.

JULY 29.

Salvage. — THE “HAIDEE.”—*Act on Petition.*—This was a cause of salvage. The *Haidee*, a bark of 335 tons, on a voyage from London to Sydney, New South Wales, on the 25th of October, 1840, touched at Porto Praya, one of the Cape de Verdes, for water, and next day, in leaving the harbour, got on some rocks, called Quail Island. A signal being made for assistance, boats from two vessels in the harbour, the *Mary Ann*, an English brigantine, and the *Oriental*, an American, proceeded to the succour of the *Haidee*, which they got into deep water, and she proceeded on her voyage. On her return to London, 24th of December, 1841, the *Haidee* was arrested by the sole owner of the *Mary Ann*, Mr. George Thomas Whittington, who entered his action against the ship and freight, on behalf of himself, the master, and crew. The owner, master, and crew of the *Oriental* afterwards likewise arrested the *Haidee*, but subsequently accepted a tender of £125 for their services. On the part of the owner of the *Haidee* (Mr. John Greenfield, of Belfast) it was alleged that Mr. Whittington had instituted the suit without authority from the master (Hartnall) or crew of the *Mary Ann*, save the mate, and that Captain Hartnall had, on the 7th of March last, accepted the sum of £150 for the services of himself and his crew, and the owner had tendered to Mr. Whittington £65,—namely, £50 and £15 for the detention of the *Mary Ann*. In reply, the owner of the *Mary Ann* alleged, that, prior to the return of that vessel to this country, the master (Hartnall) had, in communicating to his owner, Mr. Whittington, the services rendered to the *Haidee*, left it to him to settle the matter according to his judgment, and on her touching at Cork, in October, 1841, the major part of the crew, including the chief mate, had, by a written document, empowered the owner to commence and carry on the suit in their behalf, and with reference to the statement that Hartnall, the master, had accepted £150, the owner and his Proctor alleged that the first intimation they had received of such fact was communicated in a letter from the Proctor for the

owner of the *Haidee*, dated 8th of March, including a letter from the master, dated the preceding day ; and he further alleged, that, prior to any settlement, Hartnall had been apprehended on a charge of piratical felony upon his owner, and, although liberated on bail, he had been again arrested, tried, convicted, and sentenced to transportation for such piratical felony, and that it was during the time such charge was outstanding against him (between his first apprehension and his conviction) that the settlement was made, the owner of the *Haidee* and his Proctor well knowing that such charge was outstanding against Hartnall, and that the settlement was made without the knowledge or sanction of the crew. The replication by the Proctor for the owner of the *Haidee* stated, that when he was applied to, for the first time, on the 3rd of February, by the mate and two of the seamen of the *Mary Ann*, and on the 14th of February by the master, he had no information from them, though he questioned them on that head, that they, or any of the crew (except Cartwright, the second mate), had authorized their owner to institute proceedings for them, nor did he infer such fact from a letter received by Hartnall from the Proctor for the owner of the *Mary Ann*, dated the 12th of February, informing him (Hartnall) that he had commenced proceedings against the *Haidee* on behalf of himself and the crew, which letter Hartnall produced to him, and that the only intimation he had had of any impropriety in the conduct of Hartnall, until after all communications with him on the subject of the suit had terminated, was a general mention by the master of the *Haidee*, that Mr. Whittington, the owner of the *Mary Ann*, and Hartnall, had quarrelled on the arrival of that vessel at Cork, and that in consequence the owner had preferred certain charges against Hartnall, upon which he had been taken into custody, but released on bail ; and he further alleged, that Mr. Whittington had been trying to borrow money on security of his order upon the owner of the *Haidee* for his share of the salvage, and in proof of this allegation he annexed a letter from the attorneys of a firm, addressed to the owner of the *Haidee*, stating that Mr. George Thomas Whittington, of Adam Street, Adelphi,

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July 29. *The Haidee*. had agreed to take a temporary loan of their clients, between £1,000 and £2,000, proposing to give them as security an order upon the owner of the *Haidee* for the payment of whatever might be agreed upon as the amount of the claim he (Whittington) had in respect of the salvage of that vessel, the value of the ship and cargo being so great, that his claim for this salvage would very considerably exceed the advance. The Proctor for the owner of the *Haidee* further annexed certain letters addressed to mercantile firms at Liverpool, as shippers of goods on board the *Haidee* when the salvage service was rendered, of which the following is a copy:—

No. 1, Great St. Helen's, London, 27th April, 1842.

Admiralty Court.

Haidee, Marshall, from Liverpool to Sydney, stranded, &c., at the Cape de Verdes, in October, 1840, and saved, &c., by the *Mary Ann*, of London; G. T. Whittington, owner.

Gentlemen,—The proportions payable by you in the above matter in respect of your shipment being adjudged at £165 18s., I have now to require payment thereof, and in order to avoid needless trouble and expense, either to you or your underwriters, if you be insured, I have adopted this course, based upon the same vouchers and evidence as in the proceedings taken by me against the ship and outfit. Should any legal proofs or discharges be required, such may be obtained upon application to the Proctors in the matter, Messrs. Abbot, though the costs thereof should not, rightly, be at my expense. Messrs. Abbot will, as a matter of necessity, in order to terminate this procrustinated affair, cite before the Court such shippers as fail in adjusting on or before the 30th inst. I am, gentlemen, your obedient servant,

G. T. WHITTINGTON.

Messrs. —, Liverpool.

The value of the ship and freight was £4,500; that of the cargo was £9,416.

July 21. *Addams*, D., and *Harding*, D., for the *Haidee*; *Sir John Dodson*, Q. A., and *Jenner*, D., for the owner of the *Mary Ann*.

July 29. JUDGMENT. DR. LUSHINGTON.—Had this case proceeded in the ordinary course, the only question would be, the amount of salvage due under circumstances of no marked peculiarity; but the introduction of other matters, having no reference

to the services performed, or the amount of salvage to be decreed, has greatly extended the length of the proceedings, and rendered it necessary for me to advert to some of the topics which have been discussed at the bar.

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The service in question was rendered on the night of the 25th of October, 1840, by the British vessel *Mary Ann*, in conjunction with the American vessel *Oriental*, to the *Haidee*, also a British vessel, laden with a cargo, and destined to New South Wales. The occurrence took place in the harbour of Porto Praya, in one of the Cape de Verd Islands. All the vessels concerned having distant destinations, it is a matter of no surprise that much time should elapse before the institution of this suit. The *Haidee* arrived in this country at the end of December, 1841; the *Mary Ann* arrived in Ireland in October of the same year, and the action was commenced on the 10th of January, 1842. It was entered on behalf of Mr. G. T. Whittington and others, in £1,500, and an appearance was given for Mr. Greenfield, the owner of the *Haidee*. The Act on Petition bore date, at the commencement, 12th of January, 1842, and in that Act the Proctor alleged that he appeared for Mr. Whittington, the owner; Hartnall, the master; and the crew of the *Mary Ann*. In these cases, it must often happen that the authority under which the Proctor appears is not so formal and precise as in the Ecclesiastical Courts: the number of persons interested, and the different interests concerned, as owner, master, and crew, would render it exceedingly difficult to combine precision with economy and expedition in commencing suits in the Court of Admiralty. The Court most earnestly desires that Proctors will take all practicable care to be assured, as far as circumstances will permit, that they are duly authorized to appear for the individuals on whose behalf they profess to act. On this occasion, I see no reason to think that the Proctor for the owner of the *Haidee* was not justified in appearing as he did, nor that the owner had not sufficient authority to direct the commencement of the suit in the present form. It may be very true that, in many instances, the owner of the vessel is entitled to a small comparative share in the sum decreed as a reward for

Proctors to
 take care that
 they are duly
 authorized to
 appear.

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Owner not an
unfit person to
originate the
suit.

Authorized
to proceed in
this case.

salvage ; but there are many reasons which appear to point out the owner as by no means an unfit person to originate the suit. He is a person in most cases of greater responsibility, and of greater power and influence to do or cause to be done what is requisite. He or his agent is resident near the scene of action, and not occupied with business on the seas, as masters and mariners generally are. It is not to be presumed that owners, their masters, and crews, are at variance ; they may have, and indeed frequently have, conflicting interests ; but not so conflicting but that, in ordinary cases, the same Proctor could act on behalf of all concerned—indeed, it is the daily practice. In excepted cases, it would be the duty of the Proctor to give notice to those for whom he can be no longer concerned ; but these are rare cases. In the present instance, there was no want of authority to justify the owner in proceeding. The letter, dated the 3rd of June, 1842, purports to be a letter from Hartnall, the master, to his owner, and its genuineness has not been denied ; it enclosed the protest, and added : “ I leave to your own judgment as to how to proceed.” Surely, this was sufficient authority to enable the owner to adopt all proper measures respecting the salvage. To the same effect appears a document dated at Cork, October 28, 1841, whereby the owner is distinctly empowered to adopt all necessary measures as to the salvage, and it is signed by the first and second mate and several of the crew : this document is not impeached.

Though I am most clearly of opinion that the owner had sufficient authority to direct this suit to be commenced, I do not say that it was not competent to the master or crew, if they had reason to believe that their interests would be sacrificed, to withdraw the authority given, and intrust their rights to others, in whom they had reason to think they could place greater confidence. In this case, too, as in all others, it was competent to the owner of the vessel proceeded against (I say competent, not advisable) to deny the right of the adverse Proctor to proceed for the parties he professed to be concerned for. But what has been the course pursued—I must say, unfortunately pursued—and which

has very needlessly increased the bulk of the papers, and added to the litigation? In the answer to the Act, on behalf of the salvors, the Proctor for the owner alleged that, on the 7th of March, 1842, Hartnall, the master, had accepted £150 for the services of himself, his officers, and crew; that he had tendered £10 to John Cartwright, as a consideration for any injury he might have received; he denies that Hartnall ever gave any authority for the prosecution of the suit, and he tenders to Mr. Whittington, as owner, £50 as his share of the salvage, and £15 for demurrage of the vessel. Now, one of these averments appears to be utterly unsupported by the facts; I think there can be no doubt that Hartnall did give authority to Mr. Whittington to do what was necessary in the matter of the salvage; though in my view of the facts of the case, I do not consider this of any serious importance.

The negotiation and alleged settlement with the master took place without the knowledge of the Proctor who had appeared on his behalf, as well as on behalf of the owner. I cannot think that this proceeding was consistent with ordinary practice, or that it was in this case conducive to the end of justice; on the contrary, I am persuaded that the so dealing with a party for whom another Proctor had appeared, without intimation to the other Proctor, may lead to great and serious abuse. I do not approve of any agreement with a master and crew, without professional advice, when an appearance in legal form had been given on their behalf; and I am of opinion that a communication ought to have been made to the adverse Proctor, and satisfied I am that no such agreement, if contested, could be held good, either at law or in equity. There was not, and there could not be, any necessity for such a proceeding, for a tender could equally well be made in Court. Again; one of the consequences of this alleged settlement is, that persons claiming salvage were produced to make affidavits to diminish the value of those very services in which they were engaged. This is a proceeding which, I am happy to say, is very unusual, and an example I hope not to see followed. Lastly; I am of opinion that, so far as appears, Hartnall had no right to act on

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The Haides.

Negotiation
 with master
 unknown to his
 Proctor irregular
 and improper.

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behalf of the crew. The voyage was at an end; he had given authority to the owner to act for him; and, except so far as they may have ratified the arrangement, as related to the crew, it was wholly void. I also think it is extremely inconvenient for owners to take upon themselves the appertaining the salvage, unless where all parties are consenting; nor was this or any part of the proceeding necessary for the protection or the just advantage of the owner. A tender in Court would answer all fair and legitimate purposes, though it might not, perhaps, answer another purpose—that of procuring an affidavit from one of the salvors in reduction of the salvage. I think that all this proceeding was highly irregular, and I shall hold that there has been no legal settlement, and that no legal tender has been made.

Conduct of
 the owner.

It has, however, been said, that the conduct of Mr. Whittington had been such as to justify a departure from the ordinary course of proceeding, and to render expedient, if not necessary, the peculiar measures adopted in this case. Now, whatever may have been the conduct of Mr. Whittington—whether with regard to the raising of money on this salvage, or with relation to the ownership of the vessel—I am (after duly considering the question) wholly at a loss to understand how any such conduct, censurable as it possibly might be, should call for or render expedient what has been done, or have any bearing on the question. His title to sue is not denied, though it was incidentally questioned, for any kind of tender—and a tender, it is alleged, was made—is wholly inconsistent with a denial of a right to sue. The demand of exorbitant salvage from the owners of the cargo could not prejudice the owner of the ship in this Court; none of these circumstances rendered it inexpedient to make a tender in the ordinary way. It may be said, that the master and crew would not be safe with such an owner. This transaction had no reference to the interest of the owner of the ship proceeded against, and such consequences might have been prevented by stopping the payment of the salvage when decreed, and praying the opinion of the Court as to its just distribution.

I feel myself bound to notice the charge which has been

so strongly urged—that this negotiation had been carried on with the full knowledge of the Proctor for the owner, that Captain Hartnall was charged with a very serious offence against his owner's property, committed on the high seas. That some information as to the proceeding against Hartnall was given to the Proctor, I think I must believe, for it is distinctly sworn by Mr. Whittington, and it is not denied altogether in the Act on Petition, that something of this kind did occur. But I am willing to believe that the Proctor did not comprehend the full nature of the accusation against Hartnall. This misapprehension, however, furnishes another and a very strong reason against the *ex parte* proceedings adopted, and shews to what evil consequences they are likely to lead. That Mr. Marshall, however, was ignorant of what was going on as to Hartnall, it is much more difficult to believe, for both Mr. Whittington and Mr. Wright swear distinctly that he was fully informed of it in December.

There are other matters introduced into these proceedings which have very largely and most uselessly tended to increase the expense—matters on which I cannot, and ought not, hazard an opinion. I refer to the trial and conviction of Captain Hartnall, and the discussions before the Commissioners of Bankruptcy as to the ownership of the *Mary Ann*. There are affidavits upon affidavits offered to induce the Court to do that which it is incompetent to do—namely, to examine the grounds on which a conviction has taken place at common law, and to form an opinion whether that conviction was erroneous, or whether there is any probability of its being set aside. A similar observation applies to the examinations before the Commissioners of Bankruptcy on the *ex parte* statements of one party. How could I decide, on an *ex parte* statement, whether Mr. Whittington was the *bond fide* owner of the *Mary Ann*, or whether the assignee of another person had a juster claim to her? I dismiss, therefore, these matters entirely from my consideration.

There is, however, one matter which, though it has no direct bearing on the question, yet I feel it to be my duty

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not to pass over without observation: I refer to the letters addressed to the owners of the cargo, into which the name of this Court was introduced. I cannot bring my mind to think that these letters admit of so favourable a construction as has been attempted to be put upon them; I cannot but fear that reference was made to this Court by name with a view of impressing the minds of the persons to whom the letters were addressed with the opinion, that the letters, with the demand contained in them, emanated from the authority of this Court. It is not possible by any stretch of candour to give them another meaning. Looking at the heading of the letters, and the terms used in them, "being adjudged" at so and so, there having been no adjudication of any kind, even against the ship, and the representation that the "adjudication" at £165. 18s. was "based on the same vouchers and evidence" as in the proceedings against the ship, it is not possible to come to any other conclusion than that these letters were intended to convey an impression that the authority of this Court had been exercised in that behalf. The contents of these letters are not consistent with the truth; the name of this Court has been unjustifiably used, and, had money been obtained in consequence of these letters, it would have been obtained under false pretences.

Adjudication
 of the salvage.

(The Judge then proceeded to allot the amount of salvage. The value of ship, cargo, and freight, was about £14,000; that of ship and freight, upon which he had to adjudicate, was about one-third of the whole, being as £4,500 to £9,416. He was of opinion, taking the whole property salvaged at £14,000, that £700 would be an ample reward for the salvage service; but he thought that something more was due on account of the detention of the ship, and that if he gave £60 on that account, he should do all that was requisite and necessary. The proportion of the ship and freight would be £225, and he should apportion the salvage, in order to prevent future dispute, and, as far as he could, stop further expense in this matter. He should allot £50 to the owner, by way of salvage of the ship and freight, and £20 on account of detention, leaving £175 for the master and crew. This money, as related to the master and crew, must

be either brought into the Registry, or receipts must be produced from those to whom it was paid. With respect to the costs, they must fall on the owner of the ship and freight—first, because the tender was pronounced against as irregular and illegal; and, secondly, because nine-tenths of the costs had been incurred by the introduction of matter wholly irrelevant to the subject on which the Court was called upon to decide.)

Proctors:—*Abbot* for the salvors; *Tebbs* for the owner of the *Haidee*.

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AUGUST 3.

THE "PANDA."—*Motion*.—This was a question relating to a sum of money in the Registry of this Court—whether it should be considered Droits of Admiralty, or the property of the Crown, *jure coronæ*. The circumstances are these: In the year 1832, an American vessel, called the *Mexican*, was captured by the *Panda*, whereby the latter vessel committed an act of piracy. In 1833, Captain Dundas Trotter, in command of H.M.S. *Curlen*, captured the *Panda*, and some of the crew were taken at the same time. The *Panda* subsequently blew up, and was wholly destroyed. In the same year, Captain Trotter seized the captain of the *Panda* and three others of the crew; 683 dollars were found in possession of the captain, and 21 more were afterwards delivered up as part of the property of the mate. Several of the crew of the *Panda* were sent to the United States, and there tried and convicted of piratically capturing the *Mexican*, and also of taking from her 20,000 dollars, the property of an American citizen. On the 6th July, 1841, upwards of six years after the capture, application was made to this Court on behalf of Captain Trotter, his officers and crew, for bounty-money. This application was resisted, in the first instance, by the *Queen's Advocate*, on the part of the Crown, on the ground of want of information (the application not being made through the Queen's Proctor), and that the 11 Geo. 4, c. 20, sec. 72, provides that, if such claim be not preferred within six years after the service was performed, the officers and men shall forfeit their right and

Money taken on board a piratical vessel, not proved to belong to pirates, but not claimed, and not shewn by proof or reasonable presumption to be property belonging to others, held to be *bona piratarum* and droits of Admiralty. — Privilege of the Queen's Advocate and Proctor.

- Aug. 3. title to the bounty, unless the Lords of the Admiralty advised the Crown to consent to waive the forfeiture. The *Court* considered that the Statute did not prohibit this *Court* from pronouncing the bounty due, though it might be in the power of the Lords of the Admiralty to stop the payment, and directed the case to stand over, that the Counsel for the Crown might see and consider the papers. On behalf of the parties, application was made to the Lords of the Admiralty, who required explanation from Captain Trotter (then abroad), as to the cause of the delay. Subsequently, the motion in this *Court* was renewed, when the *Queen's Advocate* noticed that it was unusual for such applications to be made by any other than the *Queen's Proctor*, who was the proper medium, *ex officio*, and he again urged the delay and consequent forfeiture. The *Court* thought it better to let the matter stand over till the Lords of the Admiralty had come to a decision; and ultimately, their Lordships withdrew the claim of the Crown. The *Court* accordingly, on the motion of *Dr. Addams*, decreed a bounty of £20 each for five pirates taken during the attack, and £5 each for seventeen subsequently captured. The *Queen's Advocate* again urged that these motions should be made by the officers of the Crown, whose especial duty it was to protect the rights of the public, as well as of captors, and the *Court* offered to hear him on his privilege, which, however, the learned Advocate did not press.
- Nov. 24. Monition for the deposit of the money in Court. In the course of these proceedings, a Monition was obtained, on the part of the Lords of the Treasury, for the deposit of the sum of £144. 17s. 10d., the produce of the 704 dollars captured in the *Panda*, in the Registry of this *Court*. A communication having taken place between the *Queen's Proctor* and the Admiralty Proctor on this subject, the latter raised a formal objection to the Monition going out, whereupon the matter came before the *Court*, in the shape of a question whether the money belonged to the Crown *jure coronæ* or *jure admiralitatis*.
1842. Jan. 22. ARGUMENT. Sir John Dodson, Q. A., in support of the Monition.—I submit that the dollars were not the property of pirates, but merely goods taken out of the possession of pirates, and

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1841.
July 19.

July 21.

Nov. 24.

Monition for
the deposit of
the money in
Court.

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ARGUMENT.

therefore not droits of Admiralty, but belonging to her Majesty *jure coronæ*. That the dollars were not the property of the pirates, is established by the verdict and decree of the Court at New York, which found that they had been taken from the *Mexican*, and were the property of James Peabody, an American citizen, piratically taken. Unless it can be shewn that the dollars are droits of Admiralty, they belong to the Queen *jure coronæ*. Now all grants from the Crown must be construed strictly, as against the grantee; and the terms of these grants to the Lord High Admiral, "goods and chattels of pirates," do not include goods piratically taken. That this principle is to be applied to the Crown, is laid down by Lord Stowell in the "*Rebeckah*."*

That was a question of interest on the capture of a vessel from the island of St. Marcou, whether it should be condemned as a droit of Admiralty or to the captor. Lord Stowell said: "All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of such grants, and upon this just ground, that the prerogatives, and rights, and emoluments of the Crown being conferred upon it for great purposes and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant beyond what such grant by necessary and unavoidable construction shall take away." The words in the grant do not by necessary construction extend to goods found in the possession of pirates, unless they are the property of pirates. In *Prinston v. the Court of Admiralty*,† a prohibition went from the Court of King's Bench to that Court, under the following circumstances: Certain merchants went to sea, and on their return home committed piracy, and the ship being in the Thames, the Admiral seized it to have the goods, as forfeited under his patent, which had the words *bona piratarum*, the ships being *infra corpus comitatus*. The owner of the ship offered to put in bail to answer for the goods; but this was refused, and being in fear of losing his tackle, he took them from the ship, for which contempt he was fined. Coke, C. J., said: "When I was

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The dollars
not the pro-
perty of the pi-
rates;
but of an Ame-
rican citizen:
consequently,
they belong to
the Crown.

* 1 Rob. 227.

. † 3 Bulstr. 147.

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Attorney-General, I had occasion to search into the patent of the Lord High Admiral, and true it is that, in his patent, he hath *bona piratarum* granted unto him. But it was then in question, what goods he should have by these words; whether he should have all the goods which the pirates had stolen and taken away from others, or not; and the opinion of all the Judges then was, that he should not have those goods which the pirate had stolen from others, but only his own proper goods, and that the owners of the rest should have their goods restored to them again, if they came for them; and if they came not, then they were to be forfeited to the king, the rule being, *Quod non capit Christus, capit Fiscus*: also that the pirate ought to be attainted of piracy before the forfeiture of his own proper goods to the Admiral." The case is referred to in Jenkins' *Centuries*:* "The Admiral in his patent has granted to him *bona piratarum*: Resolved by all the Judges, that the goods of pirates pass by this grant, and not piratical goods. The king shall have piratical goods if the owner be not known." The terms employed in the patent to the Duke of Clarence (the late king), professing to recite what had been given to former Lord High Admirals, are, "goods and ships taken from pirates," instead of "goods and chattels of pirates," being a misrecital, and therefore of no effect. There is an authority on the other side. Among the letters of Sir Leoline Jenkins† is a report to the king on four questions propounded to him. The fourth is thus answered: "The ships and goods of pirates I do humbly conceive to be the Lord Admiral's, as also all goods piratically taken from the king's subjects or friends (the custody of them belonging to the Lord Admiral), in case they be not legally claimed within the year: and this though the pirate should be subdued and brought in by the king's own ships; for there are precedents (besides that these goods are in the Lord Admiral's patent) very full and apposite to this effect. As to the nice question here raised, viz. whether a king's man-of-war, mastering a pirate, who hath an enemy's ship in his possession, is to carry away the enemy for the king, quitting the pirate to

* Cent. 8, case 40, p. 325.

† Life and Letters, ii., 765.

the Lord Admiral ; I do, with submission to better judgments, answer, that the pirate's occupancy, though it be for never so long a time, doth not alter or extinguish the property in his prize ; which if it did, then might the pirate make a legal transference to another. This a just enemy can, a pirate cannot do. The king, therefore, being gotten by this casual seizure into the possession of his enemy's goods, that common maxim seems to take place, viz. *melior est conditio possidentis*." So that, according to Sir L. Jenkins, the Lord Admiral is entitled not only to the "ships and goods of pirates," but to "all goods piratically taken," if unclaimed. But in the *Caraboosa* case, in the Vice Admiralty Court at Malta, 11th September, 1830, the King's Proctor prayed that certain goods might be confiscated as the property of pirates, and as a year and a day had elapsed without claim, they might be adjudged to his Majesty in right of his Crown, and the British captors praying that they might be decreed to them ; the Judge condemned the goods as "property taken from pirates" to the Crown. I submit, therefore, on the patents and the authority of cases, that the Monition should issue, and if the property be not claimed within a year and a day, it should be condemned to the Crown.

Phillimore, D., Admiralty Advocate, on the right of the Lord High Admiral. The motion of the Queen's Advocate is perfectly novel ; there is no instance in any book of authority, or in the records of this Court, of a grant made of pirates' goods to the Crown. The dollars must be considered as the property of pirates ; the *Mexican* was plundered in September, 1832, a year before the capture of the *Panda*, of 20,000 dollars. The Queen's Advocate is in error as to the terms of the old patents ; in that granted to Lord Sandwich, in 1775, the grant is of "goods and ships taken from pirates." This is the language of the other patents. In Comyns' *Digest*,* it is said that the High Admiral is, "by the usual grant from the Crown, to have *bona piratarum*—the Admiral shall have the proper goods of a pirate after

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* Tit. "Admiralty" (D.), 289.

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his conviction.”* And elsewhere:† “Though the king grant *bona piratarum* to the Admiral, and goods taken *piraticè* are brought to England, the owner may take them; for the grant extends only to the proper goods of the pirates.‡ So, if a pirate sell goods taken *piraticè* to A. the owner may take them.”§ Sir Leoline Jenkins is no slight authority, and besides the passage cited by the Queen’s Advocate, there is the following: ||—“A French merchantman had come out from Rochelle to the West Indies, and had committed many robberies and great cruelties upon those of his crew in the voyage. He in his return put in at Kinsale for refreshment; his company accuse him; he flies; his ship and goods are confiscated as the goods of pirates.” This sentence was opposed by the French ambassador, and the cause desired to be remanded to France; but the king in Council determined that he had jurisdiction to confiscate the ship and goods, and to try capitally the person himself: “as every man, by the usage of European nations, is justiciable in the place where the crime is committed; so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what part soever they are taken.” A similar doctrine is laid down in another passage.¶ In the case of the “*Helex*,” 1820, an appeal from Malta, Dr. Arnold, the Admiralty Advocate, was consulted, and he gave this opinion: “I think that the property of pirates belongs to the Crown as droits of Admiralty.” There the goods were condemned at Malta as *bona piratarum* to the Lord High Admiral, the pirates having been convicted; in the other case, there had been no conviction: a distinction noticed by Lord Stowell. In the *Caraboosa* case, the goods were the alleged property of pirates “not convict,” and as such they were considered the property of his Majesty in right of his Crown. There was no appearance on the part of the Admiralty in that case. [PER CURIAM.—Suppose a case of property taken out of the hands of pirates who were not and could not be convicted, having made their escape: who would be

* 3 Bulst. 148. 1 Rol. 285.

† 1 Rol. 285. 3 Bulst. 28, 148.

|| 2 Vol. 714.

‡ Tit. “Biens” (E.), 601.

§ 3 Bulst. 29.

¶ 2 Vol. 772.

entitled to the custody of it?] The property would belong to the Lord High Admiral. In the case from *Bulstrode*, Lord Coke's opinion is extra-judicial, and whatever weight it may have had, it has been superseded by subsequent decisions.

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Sir John Dodson, in reply.—The exhibit annexed to the REPLY proceedings shews that the property taken belonged to a party plundered by the pirates. [PER CURIAM.—During the period of uncertainty, the property being of so mixed a character, the question is, who is entitled to the custody? There is no doubt that the Admiral is entitled to *bona piratarum*.] The property should be in the custody of the Crown, *jure corona*.

PER CURIAM.—I must take time to consider my decision Cur. adv. vult. in this case, and I must take it into serious consideration.

DR. LUSHINGTON.—As relates to the ultimate disposal of Aug. 3. this small sum of money, I do not apprehend that the de- JUDGMENT. cree of this Court will make any difference; but I suppose the question is agitated because the principle may hereafter be of importance, and therefore it is desirable that a precedent should be established.

These dollars are found in the possession of pirates; but there is no evidence to shew either that these dollars were, in the strict sense of the word, *bona piratarum*—goods belonging to pirates—or that they were goods taken by pirates piratically, and not belonging to them. It is possible, and may, perhaps, be deemed probable, that the dollars in question were part of those taken from the *Mexican*; but this is little more than conjecture; and considering the lapse of time between the capture of the *Mexican* and the taking of the pirates and the dollars,—the lapse of time being seventeen months,—I cannot judicially conclude that these dollars did belong to the *Mexican*, or the persons on board her, or who shipped property in her. I should also add, that no claim has been made on behalf of any person claiming to have any right or title to these dollars.

No proof that
the dollars were
bona piratarum.

The words of the patent to the Lord High Admiral are, “goods and ships taken from pirates.” This grant is to be construed strictly, this being the doctrine applicable to all Grant to be construed strictly;

Aug. 3. grants of the Crown, and applied to such grants by Lord
The Panda. Stowell, in the "*Rebeckah*." But though grants from the
 Crown are to be construed strictly, they are not to be con-
 not too strictly. strued with that extraordinary strictness that would deprive
 them of all efficiency and operation whatever.

Authorities. I have adverted to all the authorities which were cited
 when this case was argued, and I regret to say, they do not
 appear to me to throw much light on the question. As to
 the *Caraboosa* case, there is a circumstance in it which
 takes from it all the character of a precedent, namely, that
 it was a case of joint capture by French and English, and if
 the persons whose property was taken were pirates, they
 were not convicted as such. But I have referred to an
 earlier case, reported by Lord Coke,* to the effect that the
 King may, by 27 Edw. 3, c. 8, St. 2, seize goods taken by
 pirates, where the property is unknown, and detain them
 till proof is made. But certainly I do not find in that case
 an authority bearing upon this question. I have deemed it
 right, likewise, to look at the case of *Prinston v. the Court of*
Admiralty, reported in Bulstrode, in which Lord Coke states
 that it was the opinion of all the Judges that the Lord Ad-
 miral "should not have those goods which the pirate had
 stolen from others, but only his own proper goods, and that
 the owners of the rest should have their goods restored to
 them again, if they came for them; and if they came not,
 then they were to be forfeited to the King." What is the
 reason given by Lord Coke? "The rule being *Quod non*
capit Christus, capit Fiscus." With all deference to Lord
 Coke, it is difficult to say that the reason he has assigned
 lays a strong ground for the decision. There is another
 case in Parker's Reports,† which does not throw any light
 on the question. The authority of Sir Leoline Jenkins has
 been cited, and his high authority deserves great deference
 on such a question.

Result. Little assisted by the authorities I have referred to, and
 other authorities cited at the Bar not appearing to have
 the slightest application to the question, I come to this
 conclusion: All the authorities agree that property found

* 12 Rep. 73.

† *Foster v. Cockburn*, Park. 72.

in the possession of pirates convict, and clearly belonging to pirates, are droits of Admiralty; they all agree that property found in the possession of pirates, and belonging to other persons, are not droits of Admiralty, except Sir Leo-line Jenkins, who would give them to the Admiral at the end of a year; but none furnish satisfactory information as to what is to be done when goods are found in the possession of pirates, and there is no proof either way to whom they belong. Now, what is the legal presumption under these circumstances, and how am I to construe the grant with reference to such circumstances?

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Laying aside the fact of the *Mexican* having had 20,000 dollars on board, this is a case simply of *money* found in possession of pirates, without proof, without presumption, of the ownership being in any individual whatsoever. I have already said that the mere circumstance of the *Mexican* having been plundered of dollars seventeen months before cannot work the effect of bringing me to the conclusion that these were part of those dollars. Be it observed, I am not speaking of *goods*, but of *dollars*—of current money. Looking at the words of the grant, first, I am of opinion that the terms used in the grant, “ships and goods taken from pirates,” must not be construed to be a more extensive expression than *bona piratarum*, for this reason, which is made palpably clear by all the authorities, namely, that they evidently do not, and cannot, mean all ships and goods taken from pirates, since they cannot include such as are proved to belong to other persons. The general terms used are necessarily cut down by the authorities, and by the rule of common sense and common justice. It is not doubted in these cases that the true owners may claim ships and goods, if they can prove property in them. What is the result? It comes to this question: are all ships and goods taken from pirates to be considered to belong to them, unless the contrary is proved; and are such granted to the Lord High Admiral; or is it necessary that the grantee, before he can establish his title, should prove that the goods he claims are the proper goods of pirates?

Their application to this case.

Construction of the grant.

It is, I apprehend, necessary, before the Lord High Ad-

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miral can claim, that the persons charged with being pirates should have been convicted; or in cases where this would be absolutely impossible—as from the destruction of all the pirates, or where all the pirates, without exception, had escaped—there must be a judicial declaration that the property captured was the property of pirates. In the present case, the pirates have been convicted, and I must consider whether more than this is necessary to give the Admiral a title.

A conviction for piracy before a Court in the United States I apprehend to be as operative as before a Court established by the authority of Great Britain: they are equally Courts of public law. If affirmative proof were required that the property really belonged to the pirates, I must observe, that all the evidence is to the contrary. But must I call for such affirmative proof before the right of the Admiral could attach? If so, I must say the burthen of proof imposed by the law on the grantee would be such as to render the grant of very little value; for it is obvious from all past experience, that in very few cases indeed can any such proof be supplied.

Exposition of
its terms.

I will now advert to the opinion of the late Dr. Arnold; because, so far as the opinion of any individual practising at the bar is entitled to have weight with the Court, certainly there is no one who ever practised at this bar to whose judgment and deliberate opinion I believe the whole bar would be disposed to pay greater deference than Dr. Arnold. In the case of the "*Helen*," he expressed himself clearly in favour of the right of the Lord High Admiral to property that had been condemned to the Admiral in Malta, and no claim was made on behalf of the Crown; but there was an appeal on behalf of certain claimants brought to this Court. Lord Stowell decided in favour of the Lord High Admiral, but, as I am informed (and I have no doubt the fact is so, though I have no distinct recollection of the case myself), nothing was said as to the Crown being entitled by any right *jure coronæ*. Yet that was a case in which, if the Crown has the right which is now claimed, I confess I think it had just as good a pretence for advancing that right as upon the present occasion; for the utmost that could be said in that case was, that there had been found in the possession of pi-

rates certain goods—to whom belonging not known; certain moneys—to whom belonging not known, and claimed by none; and these are very nearly the circumstances of the present case.

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Looking at the conflict of opinions and authorities, I do not think I can assume any of them very safely as a guide; but, after considering the subject as well as I can, my own opinion is this: that no general rule can be safely laid down as supported by past authority; that each case must depend on its own circumstances; that if, from the description of the goods, there be a reasonable presumption that they could not be *bona piratarum*—that is, belonging to the pirates themselves—the Admiral could have no right; that with respect to money, it stands in a very different predicament. Money is not merchandize, and if it be difficult to identify goods, it would be next to impossible to identify money, in circumstances like the present, after such a lapse of time: but whether possible or impossible to identify it, nothing is more clear than that no such attempt has been made on the present occasion. Then I think that, speaking of money, which is the subject, and the only subject, to which my attention is now addressed, in the absence of all claim, and the sum of money not being so great but that it might probably belong to the pirates themselves, and in the absence of all proof or reasonable presumption to the contrary, it is my duty to declare that this money, found in the possession of convicted pirates, is *bona piratarum*, and that the right of the Admiral, therefore, attaches to it.

Conclusion.

Money in a different predicament from goods.

Under the circumstances, the right of the Admiral attaches.

THE "HARRIOT."—*Motion.*—In this case, a suit for salvage was commenced in this Court, by Act on Petition and Affidavits, on the part of the master (Bliss) and certain of the crew of the *Folkstone*, a South Sea whaler, for a remuneration for services of that character rendered to the *Harriot*, another South Sea whaler, at the island of Woahoo (or Oahu), one of the Sandwich Islands, in November, 1838. In defence to the action, the owner of the *Harriot* alleged, in bar, "that a custom, sanctioned by the practice of the

Salvage.—A claim resisted on the ground of a custom in the South Sea whale fishery, to render mutual salvage services gratuitously.—Issue directed, under the Stat. 3 and 4 Vict. c. 65.—

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Verdict in affirmation of the custom.—Rule to shew cause why a new trial should not be had, granted.—A new trial refused.

1841.

Feb. 9.

Application for a rule.

1842.

May 21.

ARGUMENT.

JUDGMENT.

Rule granted.

subjects of all nations engaged in such fisheries, and universally acknowledged, has prevailed from time immemorial, that whalers are bound to render assistance to each other in the nature of salvage, or other services partaking of the nature of salvage, gratuitously, and without claiming or receiving any pecuniary reward or remuneration for the same." When the case came on for hearing, after argument, the Court was of opinion* that the evidence on both sides was unsatisfactory as to the fact of the existence of the alleged custom, and under the Statute 3 and 4 Vict., c. 65, sec. 11, directed an issue to be tried by a jury, which the Court settled in the following form :—"Whether there was, on the 2nd November, 1838, a custom or usage amongst persons engaged in the South Sea whale fishery, whilst so engaged in the South Seas, that salvage should not be paid for ordinary salvage services rendered by one vessel to another." This issue was tried at the sittings at Guildhall, after Hilary Term, 1842, before L. C. J. Tindal and a special jury,† when a verdict was found in favour of the plaintiff. An application was now made to this Court for a rule to shew cause why the verdict should not be entered for the defendant, or be set aside and a new trial granted.

Sir John Dodson, Q. A., and (with the permission of the Court) *Willes*, of the Common Law Bar, were heard in support of the application, on the ground that the terms of the issue were not put to the Jury in the sense intended by this Court; that the custom alleged was not the custom found; and that the evidence ought not to have satisfied the Jury that any custom existed at all.

THE COURT granted the rule on all the points, observing: "This is a question which may turn out to be of very great importance, for it may relate not only to cases of salvage between owners of British vessels, but it may possibly be extended to cases between foreign and British owners, and I should be exceedingly anxious that the question should undergo the fullest and most complete discussion in order

* The judgment is fully reported in 10 *Monthly Law Mag.*, 110.

† *Soames v. Bliss*, 23rd February, 1842.

that this may afford a precedent to guide my judgment in future cases." Aug. 3.

Phillimore, D., for the owner of the *Harriot*, now shewed *The Harriot.*
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cause against the rule. The verdict is in unison with the ARGUMENT.
terms of the issue. The question was distinctly put to the Jury, and their finding is conclusive as to the fact.

Thesiger, Q. C., on the same side.—All the evidence has been produced that could be collected, and a new trial can have no other result than expense to the parties. The application is two-fold,—1st, to have the verdict entered for the defendant; or, 2nd, in the alternative, a new trial. There is not the slightest foundation for the first, which should have been made to the judge who tried the issue; it is not in the power of this Court to change the verdict of a jury, distinctly pronounced, and not objected to at the time. As to the other application, it is important to consider the preliminary proceedings. The affidavits in the suit being unsatisfactory, the Court directed an issue to try the fact of the existence of the custom, observing at the time, "There may be cases of great, extraordinary, and long continued merit, attended with great personal suffering and loss, and it would excite some alarm if one universal rule were laid down that in no case should any reward be paid." The Court, therefore, in framing the issue, introduced the word "ordinary," which seems to have created some difficulty in the mind of the Chief Justice, but in my humble opinion ought to have created no difficulty. We produced ship-owners and persons connected with the trade (which is of sixty-two years' standing), who never heard of salvage paid in the fishery, and who knew instances in which salvage service had been rendered and no claim made. Then began the game of *Nisi Prius*, and the other party ran for a verdict on our evidence. They do not say that they were taken by surprise, but they now say that the Jury took a wider view of the question than the Court intended. If this issue had been directed by the Court of Chancery, and such an application were made, it would be refused, on the authority of *Standen v. Edwards*.* As to the proof of the custom, the

* 1 Ves. jun. 133.

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instances are not numerous, but there is a case in the books which shews that one instance is sufficient to establish a custom. *Roe dem. Bennett v. Jeffery*.* As to the argument that the Jury have found a more extensive usage, and that such a usage is unreasonable and void, look to the record, where the finding of the Jury is in the terms of the issue. The Court can go on no other evidence than the record. When the Jury delivered their verdict for the plaintiff, the Chief Justice asked: "How do you find it in the larger and more general sense?" They answered, "We make no distinction between ordinary and extraordinary salvage." All they meant to say is, that they found the custom to exist, and had no materials before them to make a distinction between ordinary and extraordinary services. Even if they have engrafted a larger and unreasonable usage upon an equitable one, the Court will not send the case back for a new trial. The rule as to prescription is, if the party lay a larger custom than he proves, he fails altogether; but if he alleges a narrower custom than he proves, the custom is good. *Potter v. North*.† *Rogers v. Allen*.‡ *Tewkesbury (Bailiffs &c.) v. Bricknell*.§ *Henry Moore's case*.|| *Wilson v. Page*.¶ *Fitch v. Rawling*.** This is not a case of custom or prescription, but of usage, and if a jury find beyond it, they include it. A practice cannot be destroyed by shewing that it exists to a greater extent than laid.

Harding, D., on the same side, cited *Moseley v. Davies*,†† and *Gibbs v. Hooper*.‡‡

Sir John Dodson, Q. A., in support of the rule, for the defendant in the issue.—The custom found is larger than that referred to in the issue, and is illegal. Application has been made to the Judge who tried the case, to set aside the verdict, or that it might be entered for defendant, and he directed the application to stand over till the point was decided in this Court. In *Heyward's case*,§§ the Lord

* 2 Maule and S. 92.

† 1 Camp. 319.

‡ 17 How. St. Tr. 914.

** 2 H. Black. 397.

‡‡ 2 M. and K. 353.

† 1 Saund. 350.

§ 1 Taunt. 142.

¶ 4 Esp. 71.

†† 11 Price, 162.

§§ 3 Dyer, 272.

Chancellor altered a verdict. [*Thesiger*.—A special verdict is a different thing. *PER CURIAM*.—That was a construction of the meaning of a verdict.] This verdict is void for uncertainty, if the Judge or Jury understood the word “ordinary” in a different sense from this Court. No such custom as found can exist: it is suicidal. The Court can reject part and take part. Courts of Equity will grant a new trial where Courts of Law will not, to inform the conscience of the Court. The evidence as to custom is of two kinds: 1, general knowledge; 2, particular instances, *Starkie* On Ev. Savill v. Blanchard*.†

Addams, D., on the same side. The other side alleged a custom that was universal; but this Court said, a custom that should exclude all claims would be bad. Yet the Jury have found a universal custom.

Willes, on the same side. The questions are, 1, What the verdict is; 2, what it means; 3, what the Court ought to do under the circumstances. The Jury pronounced a verdict “for the plaintiff,” having both the questions put to them. The Judge then asked: “How do you find it? In the larger and general sense?” Not as read by Mr. *Thesiger*: “How do you find it in the larger and general sense?” Then they said, “We make no distinction.” [*PER CURIAM*. Did the Chief Justice express any dissatisfaction with the verdict?] It is very unusual to do so. The Chief Justice seemed to think that there was no evidence to distinguish between ordinary and extraordinary services, and if the custom existed, it is applicable to all cases of salvage, which is unreasonable and inequitable. The meaning I put upon the verdict is, that there is a custom in all cases. If so, these questions will arise: 1, Whether such a finding can be restrained by this Court to the extent which the law will warrant? 2, if it cannot (for if it can, the defendant has no resource), then, can the Court act upon its construction of the verdict as found? I submit that it cannot, for two reasons: 1, it would be illegal to do so; 2, it would not be a custom found in the terms of the issue, and there are no

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* 2 vol. 452.

† 4 Esp. 53.

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The Harriot. against me on all the grounds, may not a new trial be granted on the ground that the evidence is not sufficient? The evidence is only in support of the general custom, which is bad. We do not apply for the sake of producing fresh evidence. Then as to what the Court may do. It has been said that, as the defendant did not apply at the trial, he cannot now have the verdict entered for the defendant. But when it appears on the Judge's notes that he enters it one way and we another, the usual course is to apply to the Judge in Chambers to have the verdict altered. This was done by Mr. Justice Erskine, in *Startup v. Macdonald*.*

Cur. adv. vult. PER CURIAM.—I will take an opportunity of applying to the Chief Justice again. I have consulted him, but I will speak to him again, and give my judgment as soon as I can.

Aug. 3. DR. LUSHINGTON.—Considering that the question sub-
 JUDGMENT. mitted to the decision of the Court is the first of the kind that has come before it, it may be advisable to state the preliminary circumstances which led to its being discussed.

The case. The case originally came before the Court in the usual form of a suit for salvage, or recompense to persons who claimed to be rewarded for services rendered to a ship in distress. The defence to this action was of a kind unusual, though not unprecedented. The services were not denied, at least to a certain extent; but it was alleged that a custom existed in the South Sea whale fishery that no remuneration should be made for salvage services rendered by one South Sea whaler to another. Two questions then arose; one of law and fact.

Questions of law and fact. Of fact, whether the custom was proved to exist or not; of law, whether, if proved, the custom could be considered a legal and valid custom, to govern the rights of persons engaged in that fishery.

With respect to the question of law, I addressed my attention to it in the first instance, and for a very obvious reason; because, had I been of opinion that the custom could not be supported in law, it would have been utterly useless to consider whether it existed in fact. I came to the conclusion that such a custom, if proved to exist, would be

* 2 Scott, N. R. 485.

valid in law; I then stated the reasons on which that opinion was founded, and I see no cause to change that opinion, but, on the contrary, subsequent reflection has induced me to believe that such opinion might be corroborated by new and additional reasons.

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It then became my duty to consider whether the custom was proved by the affidavits, and the result was, that it was wholly impossible safely to come to any conclusion on that evidence. I felt most reluctant to put the parties to further expense; but, looking to the great and growing importance of this trade, to the very large amount of capital embarked in it, to the very peculiar nature of the employment of the ships and crews, and to the description of contracts by which the latter were generally bound, as well as to other considerations arising from the locality where the ships were occupied in this vocation, I deemed it my duty to have the fact tried by a Court of Common Law, where the *vidæ voce* examination, and especially cross-examination, of the witnesses, were best calculated, in such a case, to discover the truth. For these, amongst other reasons, I directed an issue in the following terms: "Whether there was, on the 2nd November, 1838, a custom or usage amongst persons engaged in the South Sea whale fishery, whilst so engaged in the South Seas, that salvage should not be paid for ordinary salvage services rendered by one vessel to another." The issue.

This issue having been tried before Lord Chief Justice Tindal, the Jury found for the plaintiff; that is, in favour of the custom. This Court has been moved to grant a new trial, and the question has been fully discussed, by the assistance of gentlemen from the Common Law Bar, to whom such matters are familiar; and I must now advert to the principal arguments adduced on that occasion. I will endeavour to state the grounds on which the new trial was contended for as fairly as I can. For the plaintiff.

It was said that the issue was not put to the Jury in the same sense as directed and intended by this Court. This observation arises from the use of the word "ordinary" in the issue, and the comments made by the Chief Justice thereon. Now, whether I did rightly in introducing that

Objections.

Aug. 3. word into the issue, or whether I erred in so doing, I assuredly did so upon consideration, and by it I did intend to limit the custom—to use the word “ordinary” as contradistinguished from “extraordinary.” I meant to include those salvage services which are of every-day occurrence, and to exclude those services which very rarely happen, and which entail upon the salvors a great loss of their own property, or that of their owners. I was aware of the difficulty of attempting this limitation; but, on the other hand, I was afraid of the risk of defeating justice by putting the custom in terms so extensive that cases of extraordinary peril, loss, and suffering, on the part of salvors, might be suggested, which would have the effect of misleading the Jury, as to the true question at issue.

As to the word “ordinary.” The Chief Justice at first seemed to be of opinion that the issue was intended to include all possible salvage services, and that the word “ordinary” meant salvage services “which are commonly allowed in other cases.” I am now quoting his words. Had the question been so left to the Jury, I should have had to regret that, by the use of an ambiguous term, I had misled the Chief Justice, and occasioned the question to be put to the Jury in a sense somewhat different from what I intended. I am, however, I think, entirely relieved from this difficulty by the wise precaution adopted by the Chief Justice, who put the question to the Jury clearly and distinctly in both ways—as a custom negating all salvage—as a custom negating only common and ordinary salvage. It appears to me, therefore, to be quite clear, that the issue was put to the Jury in the sense intended by this Court. On any ground of mistake in that respect, I am of opinion that there is no ground for granting a new trial.

It is, indeed, true that the question was also put to the Jury in a more extended sense, and that the Jury found for the plaintiff, declaring, through their foreman, that they made no distinction between “ordinary” and “extraordinary” salvage. Upon the record, the finding appears simply in favour of the plaintiff.

The verdict.

Now, is this finding impugned or affected by the Jury

having taken into consideration the greater question? I think that the verdict was not in the slightest degree affected by such circumstance. The Jury have found that the evidence supports the narrower issue; their apprehension, that the evidence might justify them in going further, does not shew that they were not right in going so far as they did. What I wanted was to be satisfied as to the fact, as to the truth of the limited proposition. The Jury say it is true; but they say they think it might be true without the limitation. Surely, this is no reason for saying they have miscarried as to the limited proposition. I can suppose many cases in which it might be the duty of this Court to direct an issue, in which the Jury might be perfectly satisfied that, to the extent to which the issue went, the facts were to be found in the affirmative, and yet might entertain an opinion that, as to the issue itself, it might have been comprised in much more comprehensive terms. If, then, I look to the record alone, if my attention ought to be confined to that, there is nothing to shew that the Jury did more than find for the plaintiff upon the issue. If I look to the notes of the Chief Justice, I find the question most fairly put to them in both points of view; and if I look to the declaration of the foreman, the utmost I could say is, that, in the view of the Jury, the evidence as to the facts would support not only the issue, but more than the issue. Perhaps the Jury may be right in their view of the question; perhaps the evidence given, wholly unopposed by any evidence on the part of the defendant, might reasonably justify their opinion (not their *verdict*, be it remembered) that no salvage reward, under any circumstances whatever, was used to be paid or demanded for salvage services between South Sea whalers in the South Seas. It does not appear to me that their finding is prejudiced by any such opinion, because the opinion is not in the slightest degree inconsistent with the finding. As to the legality of so large a custom, I have pronounced no opinion. I have never said one way or the other whether all salvage services rendered by South Sea whalers, one to the other, in the South Seas—supposing any custom to exist that no salvage should be paid—is either a good or a bad cus-

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The verdict
supports the
issue and more.

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tom. I had no reason to pronounce any opinion on such matter, and if I had done so I should have gone beyond the circumstances of the case.

Objection,
that the cus-
tom found is
illegal.

But it has been contended that the Jury have found an illegal custom—a custom not supported by the facts in evidence, nor legal if it existed *de facto*; and it has been urged that I cannot reject a part and take a part. I think that the answer to that objection is, that the Jury have done no such thing; they have found no such extended and illegal custom, if illegal; but they have said that, in their opinion, the facts would have warranted them in going further. I reject nothing that the Jury have found, and I do not conceive myself bound to incorporate their reasons into their verdict, or to say that their verdict is bad, because, in their opinion, had it been necessary, they would have been

No reason for
a new trial.

disposed to find in favour of the broader proposition. I see no reason for granting a new trial because of this opinion of the Jury. I am not aware that any authority is wanting on the subject. It must, I should think, often happen that a Jury, in finding a verdict, may entertain opinions which would carry them beyond the verdict given, were such opinions to be scrutinized. The case of *Fitch v. Rawling* was adverted to. It is not precisely in point, because the circumstances in that case were these: There were two separate defences by two defendants, and there were two customs pleaded, one good in law, the other held invalid. The Jury found for the two customs; yet the illegality of the one did not in the slightest degree prejudice the legal custom found.

Objection,
that the ver-
dict is against
evidence.

I proceed now to the last ground upon which a new trial has been asked—namely, that the verdict is not supported by the evidence. The first answer that occurs to this objection is, that the Chief Justice was not dissatisfied with the verdict. I have again spoken to the Chief Justice, as I promised to do when the question was argued, and I am justified in saying that he was not dissatisfied with the verdict. What is the necessary import of this? Why, that he thought there was sufficient legal evidence reasonably to satisfy the Jury, whose province it was to weigh and decide upon that

evidence. Now, ought I to be dissatisfied with that evidence, or has a sufficient reason been laid before me for coming to a contrary conclusion? I do not think it necessary to enter minutely into the details of the evidence. First, I look to the nature of the question proposed to the Jury—a question of mercantile usage, in a trade of no very great antiquity. I find evidence from many persons most experienced in the trade asserting that, within the scope of their knowledge, no such claims have ever been preferred. Such evidence, perhaps, standing alone, might not be of adequate weight in such a case. But I find also evidence of some cases of salvage service proved to have been performed in the South Seas by one whaler to another, and of salvage services of such a kind and of such a nature that there is no doubt that claims might have been advanced successfully in a Court of Admiralty, had those claims been preferred, and had there not been some legal objection to their being discussed and decided. Now, this is a very important fact, or rather an important set of facts, in my opinion, though I must admit that the evidence is not so full and so complete as in some cases might have been expected. But I find the defendant giving no evidence at all, though it is admitted on all hands that some cases of salvage service have, and indeed must have, occurred; whence I must necessarily infer that there is no case whatever in which salvage has been demanded and has been recovered; and, considering that this trade has existed for about sixty years, this circumstance alone appears to me to be a very important ingredient in the question of fact. It seems to me scarcely possible, considering the immense number of vessels engaged in this trade, that some such demand would not have been preferred, unless there had been a general understanding, or, in other words, a custom, to the contrary.

I am not, then, dissatisfied with the verdict, or the evidence which led to it. I see no reasonable grounds for supposing that a new trial would produce any further elucidation of the case; indeed, the defendant has no right whatever to ask for it on the ground that he would produce evidence, and it was not asked for on any such ground.

Aug. 3.

*The Harriot.*Not to be
sustained.

Aug. 3. *The Harriot.* It could not be that he would produce evidence himself, because he voluntarily waived the opportunity, by producing none on the trial. For all these reasons, not forgetting that it is my duty to prevent the incurring great expense, unless justice imperatively calls for it, I must decline to grant a new trial refused.

I need not say a word as to directing the verdict to be entered for the defendant, for I know not that it would be possible in any case; but certainly it is not in the present.

Costs. *Phillimore, D.,* asked for the costs of the owner of the *Harriot*; but

THE COURT said that, having considered that point, it thought that, it being most important that such a question, affecting deeply the interests of all concerned—a new question, never decided in any Court—should be set at rest, and it being now established *de facto* and *de jure*, costs should not be asked.

Proctors:—*Deacon* for the owner (plaintiff in the action); *Rothery* for the salvors.

Judicial Committee of the Privy Council.

AUGUST 10.

An Appellant having become insolvent, application for security for costs, refused on the ground that his assignee had appeared in this Court.

JONES v. GODRICH.—Appeal.—Motion.—This was an appeal from a sentence in the Prerogative Court of Canterbury, in a suit respecting the will of Mrs. Harriet Loyd, which was propounded by the sole executor and residuary legatee, Mr. Francis Godrich, and opposed by Mr. Pryce Jones, as one of the executors named in a prior will, on the ground of incapacity. On the 23rd December, 1841, the Judge of the Court below pronounced in favour of the validity of the will; from this sentence Mr. Jones appealed, since which he had become insolvent.

MOTION. *Robinson, D.,* for the Respondent, now applied to their Lordships to direct that security might be found by the Appellant to answer the costs; citing the rule of the Court

below, 1830.* [LORD BROUGHAM.—Is that a general rule?] Aug. 10.
 A general rule, applicable to all cases. The Prerogative Jones v. Godrich.
 Court has applied the rule in the case of *Goldie v. Murray*,†
 in which one of the parties, having become bankrupt after
 the commencement of the suit, was required to find by his
 assignees security for costs in £250. The Surrogate has
 been applied to in this case, but he referred the application
 to this Court.‡ [LORD BROUGHAM.—Has the Court below Quare, power
 the power to make such an order? Its making the order of Court below
 will not give it the power to make it.] to make such
order.

Sir J. Dodson, Q. A., for the Appellant.—The assignee The assignee
 has appeared in this Court. has appeared ;

LORD BROUGHAM.—(To *Robinson*.) Have you not suffi-
 cient security in the appearance of the assignee? Your
 motion is for security for the costs of the appeal?

Robinson.—For the general costs.

LORD BROUGHAM.—The assignee has now taken the cause
 upon himself.

LORD CAMPBELL.—The assignee would be liable for costs. he is now liable
 Motion rejected.§ for costs.
Motion re-

Proctors : *Moore* for the Appellant; *Smale* for the Respondent. jected.

* "That, in all cases, the Court may, upon application made to it,
 direct security for costs to be given by either or all of the parties."

† *Ante*, p. 35.

‡ See *Fife v. Blunt*, *ante*, p. 365.

§ The Committee consisted of the Lord President, Lord Brougham,
 Lord Campbell, Lord Langdale (M. R.), and Mr. Baron Parke.

END OF TRINITY TERM, AND THE SITTINGS AFTER TERM.

Admissions during the Term:—

AS PROCTORS.

May 23rd.—FRANK JELlicoe, Esq.

June 1st.—WILLIAM NEVE, Esq.

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POWER ; will of a married woman, under a deed requiring publication, fact of publication, not apparent on face of will, established by parol testimony. *Cooper v. Dunn*, 254.

PRACTICE :

- I.—*Administration.* 1.—Of the effects of a former wife of a party deceased intestate, refused to representative of second wife (widow) deceased, in the first instance, without a decree against the next of kin of the husband. *Re Sowerby*, 110. Is granted to persons having the interest. *Id.* 109.
- 2.—As in an intestacy, refused where a will had been *primâ facie* duly executed by a person found to be unsound. *Wilkins v. Wilkins*, 130.
- 3.—*De bonis non* granted to executors of a deceased sister of testator, a surviving sister being imbecile, and next of kin remote. *Re Southmead*, 275.

- 4.—With will, refused to a married woman (a residuary legatee), her husband declining to take part in the proceedings, notwithstanding renunciation of executors. *Bubbers v. Harby*, 308.
- 5.—, granted to widow of testator, on behalf of a minor son, appointed executor, in absence of a party having a preferable claim. *Re Widger*, 361.
- II.—*Appeal*. 1.—Where a party is actually in contempt, but the contempt is waived, he is not precluded from appealing to a superior Court. *Harrison v. Harrison*, 303.
- 2.—Where the matter appears on face of inhibition not appealable, the objection should be taken in the first instance. *Id.* 301.
- 3.—Not perempted by asking for costs in a testamentary suit after sentence, when appeal is asserted. *Horton v. Wilnot*, 312.
- 4.—Libel of appeal to Judicial Committee not required to be signed by counsel. *Fife v. Blunt*, 365.
- III.—*Commission of Appraisement*. Must not be questioned incidentally. "*Persian*," 305.
- 2.—Costs of—see *Costs*, 8.
- IV.—*Conduct of Suit*. 1.—In a case of salvage, it is irregular and improper, when a master (salvor) has authorized his owner to proceed, for the Proctor of the owner of the vessel salvaged to settle with him, unknown to the adverse Proctor, who had appeared for him. "*Haidee*," 599.
- 2.—Proctors to take care that they are duly authorized to appear. "*Wilhelmine*," 380. "*Haidee*," 597.
- V.—*Contempt*. 1.—When waived, the party in contempt is not precluded from appealing. *Harrison v. Harrison*, 301.
- 2.—An executor cited by creditor to take probate of a will, and assigned to do so, cannot be pronounced in contempt for non-compliance with the assignment, at suit of creditor. *Watson v. Tomkins*, 313.
- VI.—*Costs*. 1.—A party in a cause, becoming bankrupt, required to give security for costs. *Goldie v. Murray*, 36. But if the assignee appears, to conduct appeal, he is liable for costs. *Jones v. Godrich*, 625.
- 2.—The Surrogate of Judicial Committee not competent to order security for costs. *Fife v. Blunt*, 365.
- 3.—Where a bottomry-bond is pronounced valid in part and invalid as to the rest, and it is referred to the Registrar to report on certain items, costs of report given to bondholder. "*Heart of Oak*," 115.
- 4.—The Crown cannot give or receive costs. "*Duke of Sussex*," 165.
- 5.—In a suit for subtraction of tithes, under 2 & 3 Edw. 6, c. 13, payment of costs cannot be enforced pending appeal. *Fife v. Blunt*, 175.
- 6.—In a suit for church-rate, where the churchwardens fail in proof of part of their libel, they are condemned *pro tanto* in the costs. *Still v. Palfrey*, 235.
- 7.—Owners of cargo have no *lien* for costs on freight brought into Registry to answer a bottomry-bond, where the ship is abandoned by the owners. "*Lord Cochrane*," 285.
- 8.—In a salvage suit, where a commission of appraisement returns the value not exceeding the amount stated by the owners, the costs are borne by party taking it out. "*Persian*," 305. Such a proceeding unjustifiable. "*Wilhelmine*," 380.
- 9.—In a suit on a bottomry-bond, the validity of which is not contested by the owners, where the amount of charges is reduced in the Registry one-fourth, the bondholder condemned in the costs subsequent to reference. "*Eliza*," 306.
- 10.—When a will is pronounced for and the party opposing it appeals, but the appeal is abandoned and the cause is remitted, the Court to which it is remitted cannot, at the prayer of the representative of the

- appellant (who had died), decree costs on original cause out of estate, not prayed for before appeal was asserted. *Horton v. Wilmot*, 311.
- 11.—In a case of collision, where owners of vessel and owners of cargo proceed separately and obtain a sentence, where there has been no delay or vexation, both are entitled to their costs. "*Diana*," 359.
 - 12.—Where the owner of a foreign ship proceeding against a British vessel for damage resides out of jurisdiction of Court of Admiralty, he may be required to give security for costs. "*Druid*," 445. Even though the foreign vessel is arrested in another suit. *Id.* 446.
 - 13.—The Court of Admiralty may, in an action against the ship for damage, give costs against owner when damage pronounced for exceeds value of ship. "*Volant*," 512.
- VII.—*Creditor* not allowed to oppose a grant of probate to the executor *s. t.* *Menzies v. Pulbrook*, 143.
- VIII.—*Evidence*. 1.—A solicitor examined as a witness, and speaking from a reference to entries in his books, not compelled to produce the original books. *Godrich v. Jones*, 2.—But *quære*. *Deare v. Elwyn*, 342 n.
- 2.—In a suit respecting the will of a testator whose later will had been set aside for unsoundness of mind, the evidence taken in the former cause not admitted, on application at hearing. *Wellesley v. Vere*, 242, 247.
 - 3.—Log of a Queen's ship, claiming to share as joint captor of a slave vessel, not admissible. "*Sociedade Felix*," 292.
 - 4.—In a suit for divorce, by reason of adultery, fact of diversity must be proved by direct evidence. *Vere v. Vere*, 369. A decree of confrontation is not conclusive evidence of identity. *Dillon v. Dillon*, 423 n.
 - 5.—A solicitor responsible to the Proctor for his costs, whose incompetency thereby has not been discovered till after publication, not allowed on release to be re-examined. *Rendall v. Rendall*, 493.
 - 6.—Where a party in a cause dies before the requisition for examination of witnesses abroad had been executed, the examination must recommence from date of party's death. *Best v. Finlay*, 513.
- IX.—*Faculty*, for a vault, cannot be had where the church is not consecrated. *Turner v. Hanwell (Rector, &c. of)*, 368.
- X.—*Interrogatories*, objectionable, rule respecting. *Burder v. Speer*, 62. The Court has no means of preventing. *Id.* 62.
- XI.—*Inventory and Account*, an administratrix not compelled to exhibit, after 18 years' acquiescence of party interested, and there being no averment that estate not duly administered. *Scurrah v. Scurrah*, 252.
- XII.—*Motions, ex parte*. 1.—Court will not decide thereon, respecting alterations in a will, if opposed, however strong the presumption. *Re Jackson*, 93.
- 2.—Must be specific, not in an alternative. *Re Parke*, 104.
- XIII.—*Plea*. 1.—Inconvenience of want of a defensive plea in suit for wages. "*Duchess of Kent*," 182.
- 2.—Court will not shut out a counterplea on mere suggestion that it is vexatious. *Dillon v. Dillon*, 418. A double plea allowable, though inconsistent. *Id.* 419.
- XIV.—*Privilege* of Queen's Advocate and Proctor. "*Panda*," 604.
- XV.—*Proceeds* of a vessel hypothecated, sold under decree of Court of Admiralty, in a cause of salvage, allowed to be arrested in the Registry, at peril of bondholder. "*Wilsons*," 115.
- 2.—A holder of a bottomry-bond, on ship, freight, and cargo, entitled to have its amount (judgment against ship and freight having gone by default) paid out of proceeds of ship and freight in Registry, notwithstanding owner of cargo claims a *lien* on the freight for costs. "*Lord Cochrane*," 285.

XVI.—*Proxy*, nature of, required to enable a father to proceed as *curator* on behalf of a minor absent husband, in a suit for divorce by adultery. *Morgan v. Morgan*, 28.

—, for an agent of an absent major husband. *Scovell v. Scovell*, 34.

PROCTORS bound to know the names of parties for whom they appear. "*Wilhelmine*," 390. And to take care that they are duly authorized to appear. "*Haidee*," 597.

—, admissions of, 160, 625.
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REPAIR of churches—see CHURCH-RATE, 4.

REPUBLICATION of unattested alterations in a will by execution of an attested codicil. *Re Mogg*, 325.

RESTITUTION of conjugal rights, suits for. *Drew v. Drew*, 319. *Dillon v. Dillon*, 443.

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1.—A will torn by a testator, with intention to revoke, but who, immediately repenting, directed the pieces to be stitched together, held to be *prima facie* revoked. *Re Colberg*, 91.

2.—By substitution, when substitution is ineffectual; no revocation. *Brooke v. Kent*, 100.

3.—Marriage and birth of issue operate to an absolute revocation of a will dated prior to stat. *Walker v. Walker*, 131.

4.—Where part of a will is cut away, it is a partial revocation, whether before or after stat. *Re Lambert*, 132.

5.—A codicil burnt at one corner and torn through, not coming from repositories of testator, whose papers had been improperly dealt with, not revoked. *Wood v. Goodlake*, 159.

6.—Of a will of 1822, by a pencil writing without date, ineffectual. *Re Farington*, 237.

RULES OF NAVIGATION, by Trinity House, though not law, binding upon vessels. "*Duke of Sussex*," 166. Rule applicable to steam-vessels. *Id.* 166.

SALVAGE:

1.—Services by a vessel sailing in company with the vessel salvaged, not entitled to a large compensation. "*Ganges*," 90.

2.—Distribution of award by magistrates not within jurisdiction of Court of Admiralty, under 3 & 4 Vict. c. 65, unless application had been made to the magistrates. "*Hope*," 113.

3.—Refused on account of erroneous and improper conduct in salvors. "*Dydden*," 115. Persons who assume character of salvors, where more competent persons are at hand, entitled to no indulgence. *Id.* 117. On account of vessel not proved to be in danger. "*Wilhelmine*," 379.

4.—Preserving lives of crew of a ship, but not salvaging property, founds no claim for salvage. "*Zephyrus*," 339. Nor an *unsuccessful* attempt to salvage property. *Id.* 339. Whether stat. 1 & 2 Geo. 4, c. 75, gives to justices authority to entertain claims for preserving life, *quære*. *Id.* 340.

5.—Resisted on the ground of a custom to render mutual salvage services gratuitously. "*Harriot*," 613. Issue directed to a Court of Law. *Id.* 614. New trial moved for. *Id.* 614. Refused. *Id.* 624.

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- 29 Car. 2, c. 3—580.
- 30 Geo. 3, c. 71 (local)—194.
- 1 & 2 Geo. 4, c. 75—340.
- 6 Geo. 4, c. 125—163, 332, 358.
- 5 & 6 Will. 4, c. 19—16.
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- 1.—Of an owner of a ship, become bankrupt, held to be discharged by negotiation between the parties to the action, prior to his bankruptcy, to settle out of Court. "*Harriett*," 338. What amounts to "giving time." *Id.* 333. The principle, "if the sureties might have been prejudiced." *Id.* 335, 337. Liability of bail once extinguished cannot be revived. *Id.* 338.
- 2.—Of a deceased insolvent administrator, who had misapplied assets, liable notwithstanding lapse of time. *Rudge v. Partridge*, 219.

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- 1.—Made before 1838 not altogether out of Stat. *Brooke v. Kent*, 96.
- 2.—A paper must be signed by testator before it can be designated "a will." *Re Olding*, 169.
- 3.—There cannot be two substantive wills. *Henfrey v. Henfrey*, 357.
- 4.—Lost or stolen, copy admitted to probate. *Re Cousins*, 236.

See ALTERATION—ATTESTATION—DESTRUCTION—POWER—REVOCATION.

END OF VOL. I.

ERRATA.

Page 37, line 18, *for* "after," *read* "before."

60, — 12, *for* "religious," *read* "malicious."

145, — 21, *for* "I had seen the evidence and argued on the evidence," *read* "I had not seen the evidence nor argued on the evidence."

461, — 35, *for* "Oldham v. Wainwright," *read* "Oldknow v. Wainwright," and *passim*, throughout that case.

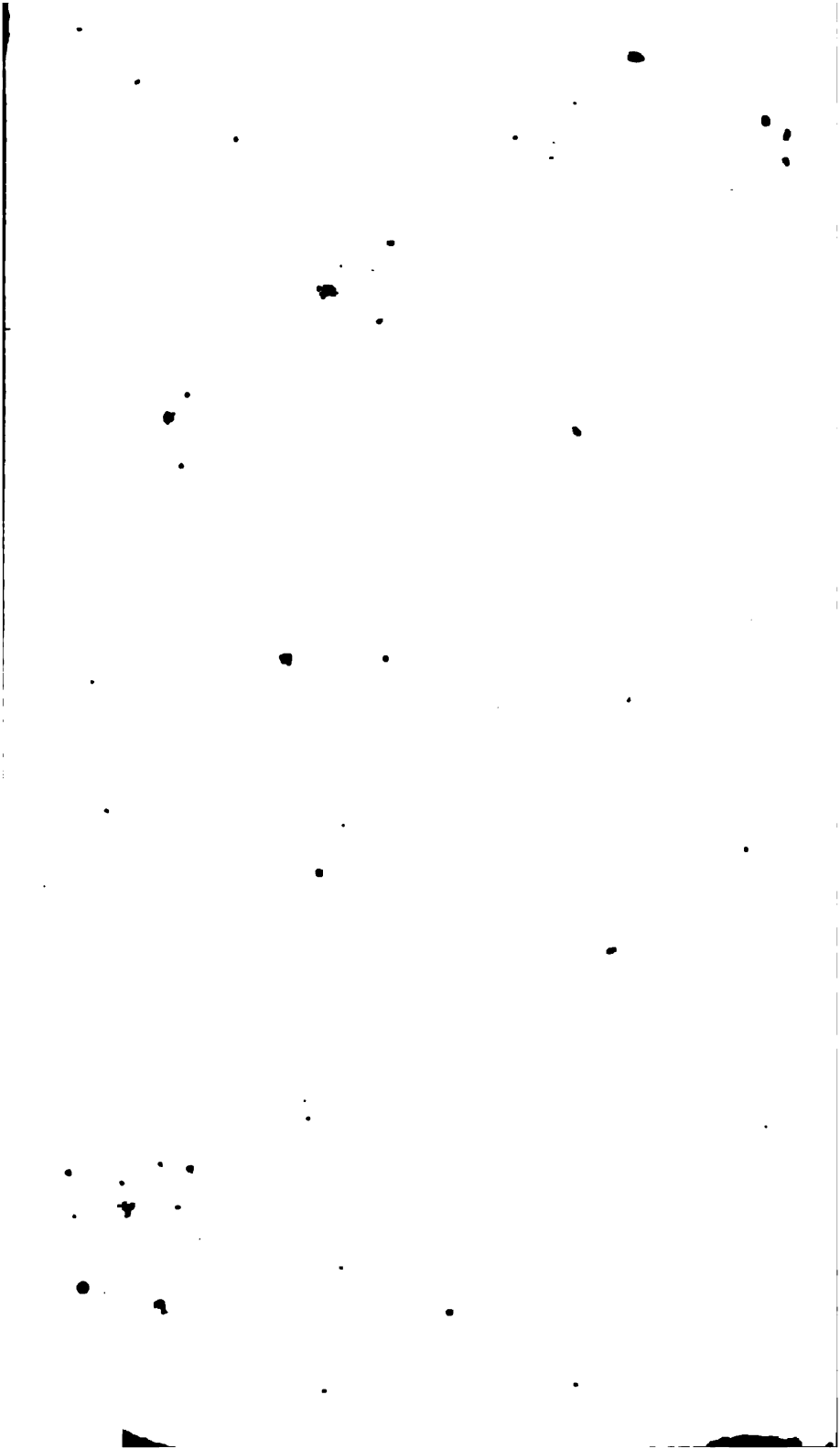
468, — 3, *for* "was made," *read* "was not made."

515, — 34, *for* "appointments," *read* "appointees."

521, — 24, *for* "it said," *read* "it is said."

532, — 22, the Proctors' names should be transposed.





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